IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1695

JAMES A. CARINI, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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DECISIONS BELOW

The United States District Court for the Eastern District of Virginia on January 7, 1975, found for the plaintiffs. (App. p. 9a)

On appeal the United States Court of Appeals for the Fourth Circuit reversed the decision of the lower Court and found for the United States. (App., p. 2a)

GROUNDS FOR JURISDICTION

The plaintiffs petition the Supreme Court of the United States for a Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, which decision was handed

down the 19th day of December, 1975, and upon a Petition for Rehearing which petition was denied by Order of the Court entered the 20th day of February, 1976.

Jurisdiction of the Federal Courts is based on the Tucker Act, 28 U.S.C. § 1346(a)(2) and Venue is based upon 28 U.S.C. § 1391(e).

Jurisdiction of the Supreme Court of the United States to review the Order of the Court of Appeals for the Fourth Circuit is based on 28 U.S.C. § 1254(1) and on the U.S. Const., Art. III, § 2, cl. 2.

QUESTIONS PRESENTED

1. Whether the unilateral retroactive modification of an Enlistment Contract by Congressional Action can deprive petitioners of a vested property right in violation of the Fifth Amendment to the United States Constitution?

2. Whether the government is estopped from denying the petitioners the variable re-enlistment bonus which the government promised them?

3. Whether public law 93-277 amending 37 U.S.C. 308 (g)(1968) requires the United States Navy to break its contracts with the petitioners for the payment to them of their variable re-enlistment bonuses?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The constitutional provisions, treaties, statutes, ordinances and regulations which this case involves are as follows:

U.S. Const., Fifth Amendment
The Tucker Act, 28 U.S.C. § 1346(a)(2)
Uniformed Services Pay Act of 1968, Pub. L. No. 89-131 § 3, 37 U.S.C. § 308 (1968)

Armed Forces Enlisted Personnel Bonus Revision Act of 1974, P.L. 93-277 § 2 (1), 37 U.S.C. § 308 (1974)
Do Navy BUPERINST 1133.18E § 7h (Mar. 23, 1972)
DOD Directive 1304.14 § IV.F (Sept. 3, 1970)
DOD Instruction 1304.15 § V.B.1 (Sept. 3, 1970)
DOD Instruction 1304.15 § VI.A (Sept. 3, 1970)

STATEMENT OF THE CASE

Petitioners herein contend that the United States owes to each of them certain monies, to which they became entitled upon entering into an enlistment contract as members of the United States Navy. The monies claimed represent the contractual payment to which each petitioner became entitled when each petitioner in return for the money promised by Navy recruiters, agreed with the United States to extend his intended four-year service obligation for two additional years. The precise amount owed each petitioner is computed according to a re-enlistment formula which is a part of the enlistment extension contract. The United States Navy, claiming that the petitioners are not entitled to the benefit of the formula nor to the monies the formula represents, refuses to pay petitioners in accordance with the contract. The United States Navy does, however, require each petitioner to serve the two year extension of service time.

In 1965, the Department of Defense sought and received Congressional authority to establish a system of incentive bonuses to promote retention of persons in highly technical military occupational specialties by inducing the specialists to re-enlist. As enacted by Congress and employed extensively by the Navy, the Act provided for a flexible system of incentive bonuses to

be based on the enlisted member's monthly base pay, multiplied by the number of years of the re-enlistment, times a "Variable Multiple" factor.

All of the petitions arrive in Court having traveled the same route. An original "Enlistment Contract" (DD Form 4, 1 Apr. 68) was executed by each petitioner which obligated him to serve four (4) years in the United States Navy. Each of the petitioners then underwent testing and evaluation to determine their career potentials. Thereafter, either during or at the conclusion of basic training each petitioner was asked to extend his enlistment to study special technical subjects in which there then existed a shortage of trained personnel. Petitioners were required to extend their four year enlistment for two additional years, in order to study the subjects, but were promised a substantial bonus at the end of the original four years. The standard form agreement petitioners executed was entitled "Agreement to Extend Enlistment". As part of the "Agreement to Extend Enlistment" Contract, at the places whereon it is printed "Reason for Extension", in most cases the "reason" typed thereon was: "Training (Nuclear Field Program or Advanced Electronics (AEF) Field Program. AUTH: BUPERSMAN 1050300). I understand that this extension becomes binding upon execution and thereafter may not be cancelled except as set forth in BUPERSMAN 1050150".

None of the enlistment and re-enlistment documents relevant herein contains an express reference to a variable re-enlistment bonus. However, the "Agreement to Extend Enlistment" contract states that each petitioner was extending his enlistment ". . . in consideration of the pay, allowances and benefits which will

accrue to (him) during the continuance of (his) service." In fact, the Navy sold their recruits the specialized training, which required additional service, for the price of the bonus.

There was in effect at the time each petitioner executed the extension agreement a federal statute, 37 U.S.C. § 308(g) (1968), and Department of Defense and Department of Navy implementing regulations, which provided that servicemen who voluntarily extended their enlistment were entitled to a bonus payable in equal yearly installments during the extension period. At the time of the extension agreements the petitioners met the criteria set forth in 37 U.S.C. § 308(g) (1968) and the regulations promulgated pursuant thereto, and implementing the statute. The system of enlisting Navy personnel under an enlistment contract of four years duration and an extension agreement of two years duration, was part of an official Navy enlistment program, designed to retain Navy personnel in certain critical military occupational specialties, and each of the petitioners in this case relied upon payment and receipt of the bonus as an inducement to extend their service.[1] Pursuant to the contracts the enlistees have undertaken special training and have obligated themselves for two years additional service.

On May 10, 1974, the President signed into law, Public Law 93-277 which amended 37 U.S.C. § 308 so as to terminate the variable re-enlistment bonus program effective June 1, 1974. However, Public Law 93-277 contains no provision barring payment (after

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[1] For a full discussion of the program and its history, see *Larionoff* v. *United States*, No. 74-1211 and 74-1212 (Feb. 17, 1976, D.C. Circuit), Appendix p. 69a at 77a.

June 1, 1974) of variable re-enlistment bonuses, contracted for prior to June 1, 1974. The Department of Defense and Department of Navy have refused to pay any VRB's after June 1, 1974, but have required the petitioners to serve the two year extension of service without the benefit of the VRB payment.

The petitioners filed suit in the Eastern District of Virginia pursuant to the Tucker Act, 28 U.S.C. § 1346 (a)(2) seeking payment of their bonus or release from the two year extension. Judge Kellam, upon hearing the case, held that the petitioners were entitled to their bonuses because the petitioners contracted for the rights and benefits at the time the agreement to extend enlistment was signed. Opinion and Order *Carini* v. *United States*, No. 74-88-NN (E.D. Va. 1975), (App. p. 9a).

After concluding that the Navy was contractually bound to pay variable re-enlistment bonuses, the Court found the principal issue to be whether or not Congress could retroactively alter the contracts between the parties. (App. p. 11a.) The Court, finding that the Congress acted purely for reasons of economy, held that the contracts could not be altered and that the plaintiffs must be paid. (App. p. 14a.)

The Fourth Circuit Court of Appeals, while finding the plight of the petitioners "most appealing" from a moral point of view disagreed, holding that a bonus, once promised, could be retroactively taken away.

ARGUMENT ONE

The Decision of the Fourth Circuit Court of Appeals Is in Direct Conflict with the Opinion of the Court of Appeals for the District of Columbia, in Larionoff v. United States Decided February 17, 1976, and Is Potentially in Conflict with the Decisions in Four District Court Cases,[2] Consolidated on Appeal to the Ninth Circuit Court of Appeals, and with Caola v. United States, Now on Appeal to the Second Circuit Court of Appeals.

Rule 19 (1)(b), Rules of the Supreme Court of the United States, sets forth the criteria upon which a Writ of Certiorari may be granted and states, in part:

> "(1) . . . The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> (a) * * *
>
> (b) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, . . ."

Federal District Courts, sitting in Hawaii, California, Virginia, Connecticut, and the District of Columbia, have all heard cases of an identical nature, founded on the same facts as pertain herein. In each instance, the claimants have been awarded judgment against the

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[2] *Aiken* v. *United States* (S.D. Cal.), Appellate Docket Nos. 75-3238 and 75-3432, Ninth Circuit Court of Appeals. (App. p. 43a)

Adams v. *United States* (C.D. Cal.), Appellate Docket No. 75-3559, Ninth Circuit Court of Appeals. (App. p. 32a)

Collins v. *Schlesinger* (D. Hawaii), Appellate Docket Nos. 75-2935 and 75-2967, Ninth Circuit Court of Appeals. (App. p. 23a)

Saylors v. *United States*, Appellate Docket No. 75-3348, Ninth Circuit Court of Appeals.

United States,[3] and the Court has ruled that the United States may *not* unilaterally rescind the bonus provisions of a re-enlistment contract.

In February, 1976, after the Fourth Circuit Court of Appeals spoke on the issue, the District of Columbia Court of Appeals issued an opinion premised on facts identical to those herein. *Larionoff* v. *United States*, ——F.2d —— (D.C. Cir. 1976). (App. p. 69a) The Court considered the unanimous opinions of the District Court Judges, sitting in four states and the District of Columbia, summarily rejected the Fourth Circuit Court opinion, and upheld petitioners' claims against the United States.[4]

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[3] *Collins* v. *Schlesinger, supra.*
Aikin v. *United States, supra.*
Adams v. *United States, supra.*
Caola v. *United States* (No. H-75-110) (D. Conn. Dec. 4, 1975) (App. p. 54a)
Carini v. *United States* (No. 74-NN) (E.D. Va. Feb. 3, 1975) (App. p. 9a)
Larionoff v. *United States, supra.*

[4] The Court made the following statement regarding Carini as set out in p. 26 of the slip opinion footnote No. 35:

> "This identical question was recently presented by different groups of naval enlisted personnel to the District Court for the Eastern District of Virginia in *Carini* v. *United States*, Civil No. 74-88-NN (Jan. 7, 1975), to the District Court for the District of Hawaii in *Collins* v. *Schlesinger*, Civil No. 75-0053 (May 20, 1975), to the District Court for the Southern District of California in *Aiken* v. *United States*, Civil No. 75-0062-N (Aug. 26, 1975), and to the District Court for the District of Connecticut in *Caola* v. *United States*, Civil No. H-75-110 (Dec. 4, 1975). Those courts reached the same conclusion as we reach today.
>
> We are aware that the Fourth Circuit has reversed the District Court decision in *Carini* on the ground that the 1965 statute was not "a part of the re-enlistment agreement," slip opinion at 6, and that the "contract . . . anticipated possible statutory change," slip opinion at 8. *Carini* v. *United States*, No. 75-1399 (Dec. 19, 1975). We obviously disagree. The Government argued that the case before us turns primarily on the construction of the applicable military regulations. Brief at 15. And as our textual discussion indicates, we construe those regulations to mean that VRB eligibility attaches when an extension agreement is signed. Thus, under our view of the case, the contract clause did not anticipate possible statutory changes and an explicit clause would have been necessary to achieve that effect given existing regulations. See slip opinion pages 21-22 supra.
>
> The Fourth Circuit opinion in *Carini* also places some emphasis on the Congressional intent evidenced in a section of the Conference Report accompanying the 1974 statute ironically labeled "Clarification of interpretation of bill language." H.R. Rep. 93-985, 93d Cong., 2d Sess. 4 (1974). Even if we were to agree that the language in the report indicates that Congress intended to allow the members of this class to become eligible for the new Selective Re-enlistment Bonus "if, during the initial enlistment period, the old re-enlistment extension agreements are cancelled and new ones executed calling for a longer period of extended service," slip opinion at 6, we would still be unable to find any reason to justify congressional abrogation of existing contract obligations to members of the class." (App. p. 92a)

Similar cases are still pending in California, Washington, Idaho, Hawaii, South Carolina, and Florida. A New case involving a substantial number of petitioners, is scheduled for filing in the Eastern District of Virginia. Unless the issues raised herein are resolved by this Honorable Court, the prospective Virginia litigants would be well advised to cross the Potomac and file in Washington, D. C.

Rule 19 considers the undesirability of compelling litigants to forum shop. The present inconsistency in the Circuit Court decisions creates a highly inequitable result, and encourages potential litigants to file suit in a Circuit favorable to their point of view. In light of the number of suits already pending before the courts concerning eligibility for payment of the variable re-enlistment bonus and the fact that there are numerous

litigants waiting to file suit, continued conflict between the District of Columbia Circuit and the Fourth Circuit Court of Appeals must be viewed as highly undesirable.

Two of the issues raised on appeal, simply stated, are:

(1) Did the petitioners herein fulfill their obligation to the U. S. Navy so as to be entitled to a re-enlistment bonus?

(2) Does the United States have the right to unilaterally rescind the bonus provisions of a re-enlistment contract?

In the *Larionoff* case, petitioners sued for recovery of variable re-enlistment bonuses after the United States Navy had determined that the occupational specialties in which they were engaged no longer constituted critical skills for which such bonus would be paid. After a thorough analysis of the cases, including the opinion rendered by the Fourth Circuit Court of Appeals, Judge McGowan concluded that each plaintiff had a contract right (under the same contract for re-enlistment as was signed by petitioners herein) to payment of the bonus authorized by the Uniform Services Pay Act of 1965 and regulations existing at the time the re-enlistment contract was signed. The Court also decided that the Navy could not administratively end that entitlement.

As Judge McGowan notes in *Larionoff* (App. p. 95a), the government is required to treat all members of a class, similarly situated, in a like manner. If, in fact, all members of the class are to be treated in a like manner, are those members of the Navy who are petitioners herein thus entitled to benefit from the decision in the *Larionoff* case by virtue of the doctrine of *res*

adjudicata? If so, then it would seem appropriate for them to dismiss this appeal and file an action in the District Court for the District of Columbia, which would be obligated to adhere to the decision of the District of Columbia Court of Appeals. If the doctrine of *res adjudicata* is not applicable, then the government must be entitled to treat members of the same class in an inconsistent manner by virtue of multi-district litigation involving the same issue.

It is obvious that the confusion will be compounded by additional litigation in the absence of definitive action by this Honorable Court.

ARGUMENT TWO

Because of the Number of Cases Pending, the Importance of the Issues Presented, and the Conflict with Other Federal Decisions, the Carini Case Presents a Compelling Need for Guidance by the Supreme Court.

Under Rule 19 (b) of the Rules of the Supreme Court, review on certiorari is proper when the Appeals Court has decided a federal question in a way in conflict with applicable decisions of the Supreme Court. It is clear that such a conflict is present in the case before the Court.

At the district court level, there are approximately twenty three (23) [5] cases pending, and at the Court of

[5] The following is a list of the pending District Court cases.

Wood v. *United States*, No. CV75-0382-N (S.D. Cal.)
Scarborough v. *Schlesinger*, C.A. No. CV74-585-N (S.D. Cal.)
Ruble v. *Schlesinger*, C.A. No. CV75-0272-N (S.D. Cal.)
Adams v. *United States*, C.A. No. CV74-1585-ALS (C.D. Cal.)
Kleveno v. *Rogers*, C.A. No. C74-2535-AJZ (N.D. Cal.)
Braye v. *Webster*, C.A. No. Civ S-74-484 (E.D. Cal.)
Braswell v. *Webster*, C.A. No. C75-286S (W.D. Wash.)

Appeals level there are approximately six (6) pending cases. All of the cases decided to date at the district and appellate levels have found for the petitioners, except the *Carini* appellate decision. The Court of Appeals in *Carini* quoted from *Bell* v. *United States,* 366 U.S. 393, 401 (1961) as follows:

> "a soldier's entitlement to pay is dependent upon statutory right."

Based on that quotation, the Fourth Circuit held that since the VRB statute was not in effect at the beginning of the extension of enlistment period the re-elistees were not entitled to a bonus. The Supreme Court in *Bell* used the quoted statement to hold that even a Korean war defector was entitled to his military pay until that pay was terminated as provided in the controlling statutes. The Fourth Circuit has expanded the sweep of the statement far beyond the matters at issue in *Bell.*

Borschowa v. *Middendorf,* C.A. No. 75-599S (W.D. Wash.)
Birdsall v. *United States,* C.A. No. 75-510S (W.D. Wash.)
Switzer v. *United States,* C.A. No. Civ 4-75-11 (D. Idaho)
Johnson v. *Schlesinger,* C.A. No. 75-0079-P (D. Hawaii)
Aprill v. *Schlesinger,* C.A. No. 75-0142-P (D. Hawaii)
Armour v. *Schlesinger,* C.A. No. 75-0221 (D. Hawaii)
Achterhof v. *Schlesinger,* C.A. 75-0275 (D. Hawaii)
Bailey v. *Sylvester,* C.A. No. 75-9 (D. S. Car.)
Crawford v. *Mangol,* C.A. No. 75-227 (D. S. Car.)
Blockus v. *Schlesinger,* C.A. No. 75-962 (D. S. Car.)
Grezeika v. *Schlesinger,* C.A. No. 75-1220 (D. S. Car.)
Wilson v. *Schlesinger,* C.A. No. 75-1344 (D. S. Car.)
Johnston v. *Schlesinger,* C.A. No. 75-1288 (D. S. Car.)
Alderfer v. *Schlesinger,* C.A. No. 75-1854 (D. S. Car.)
Agnew v. *Schlesinger,* C.A. No. 75-1624 (D. S. Car.)
Beard v. *United States,* C.A. No. Civ. 75-561-J-S (M.D. Fla.)

The Fourth Circuit appellate decision is in conflict with general principles of law announced in numerous cases. In *Lynch* v. *United States,* 294 U.S. 330, (1932), the Court held that because of the Fifth Amendment, the Federal Government was equally bound to honor its contracts as is a private party. The duties of the government are governed by laws applicable to contract between individuals.

Contracts are construed as of the time of execution. *Larionoff* v. *United States,* 365 F. Supp. 140, 145 (D.C. D.C. 1973). Enlistment in the military service establishes a contractual relationship. *United States ex rel. Whitaker* v. *Callaway,* 371 F. Supp. 585, (E.D. Penn. 1974); *Mellinger* v. *Laird,* 339 F. Supp. 434 (E.D. Penn. 1972); *Goldstein* v. *Clifford,* 290 F. Supp. 275 (D.C. N.J. 1968); *Pfile* v. *Corcoran,* 287 F. Supp. 554 (D.C. Col. 1968).

All of the elements of the contract are to be determined under general contract law, including the law of federal contracts as determined in Federal Court decisions. *Peavy* v. *Warner,* 493 F.2d 748 (5th Cir. 1974); *United States ex rel. Whitaker* v. *Callaway, supra; Pfile* v. *Corcoran, supra; Colden* v. *Asmus,* 322 F. Supp. 1163 (S.D. Col. 1973).

The enlistment instruments and the statutory law in effect when the instruments are signed constitute the complete enlistment contract. *Rehart* v. *Clark,* 448 F. 2d 170 (9th Cir. 1971); *Johnson* v. *Powell,* 414 F.2d 1060 (5th Cir. 1969); *Larionoff* v. *United States,* (D.C. Cir. No. 74-1211 and 1212, Feb. 17, 1976); *Morse* v. *Boswell,* 289 F. Supp. 812 (D.C. Md. 1968), aff'd., 401 F.2d 544 (4th Cir. 1968), cert. den. 393 U.S. 1052 (1969).

Other courts including the D.C. Circuit in *Larionoff*, and the District Courts in *Caloa* v. *United States, supra,* (App. p. 54a); *Collins* v *Rumsfeld, supra,* (App. p. 23a); *Adams* v. *United States, supra* (App. p. 32a); and *Aikin* v. *United States, supra,* (App. p. 43a) have applied the above principles of law and have arrived at a completely different decision than the decision of the Fourth Circuit in *Carini*. The holdings in the cited cases are directly contrary to *Carini,* and raise questions of law dealing with federal contract law, federal statutory law and federal constitutional law. The issues presented in all of the pending cases and in *Larionoff* and *Carini* can be resolved only by the Supreme Court.

At stake in this case are not only the contract rights of the 260 petitioners, but also those of an estimated 30,000 Navy enlistees,[6] who were promised a variable reenlistment bonus in return for their contract to extend enlistment. Due to the large number of petitioners involved in the numerous cases, it is of compelling importance to have a decision from the Supreme Court in order to prevent conflicting decisions in the various districts and circuits, and further, to prevent the unequal treatment of re-enlistees with the same rights.

The government in *Larionoff* has moved the Court for an *en banc* rehearing by the D.C. Circuit.[7] In its petition the government asserted that the decision raises issues of "exceptional importance" under Rule 35(a),

[6] The number of affected parties is based on the Affidavit of Rear Admiral Charles Griffith, U.S. Navy dated October 10, 1974 and filed in the case of *Adams* v. *United States,* No. 74-1585-ALS (C.D. Cal. 1975).

[7] The Petition for Rehearing was subsequently rejected by the Court. (App. p. 109a).

Federal Rules of Appellate Procedure. In its petition the government stated:

> "Concerning plaintiff Johnson the panel has held that he is entitled to payment of the VRB notwithstanding that Congress revoked the VRB befor he was entitled to receive payment. As such the panel decision raises important questions of Congressional power which merit *en banc* consideration." Defendants-Appellants-Cross-Appellee's Petition for Rehearing and Suggestion for Rehearing *en banc, Larionoff* v. *United States,* Civil Nos. 74-1211, 74-1212 pp. 6-7.

The case of *Carini* is of no less "exceptional importance", as the same issues were before the Fourth Circuit Court of Appeals, therefore the *Carini* case warrants certiorari by the Supreme Court pursuant to Rule 19(b). The government has admitted in *Larionoff* that the very issues involved here come within the class of cases deserving review by the Supreme Court.

There is also a public policy issue in this case dealing with the credibility of one's government. The government should not be permitted to lead young men and women to believe that they will receive a substantial cash incentive if they extend their term of enlistment, only to withdraw the cash incentive at a later date under the guise that the law was changed regarding the cash incentive, and yet require that they serve the two years of extended enlistment.

ARGUMENT THREE

The Government's Retroactive Modification of an Enlistment Contract by Its Refusal To Pay a Contracted for Bonus Deprives Petitioners of a Vested Property Right in Violation of the Fifth Amendment to the United States Constitution.

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch* v. *United States,* 292 U.S. 571 at 579 (1934).

With the foregoing words, Justice Brandeis reiterated an established and fundamental principle of law—that the United States is as much bound by its contracts as are individuals.

When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private parties, *Lynch* v. *United States, supra,* and this is true of enlistment contracts. *Peavey* v. *Warner, supra; Colden* v. *Asmus, supra; U.S. ex rel. Whitaker* v. *Callaway, supra.*

Each of the petitioners herein entered into an enlistment contract with the Navy providing for an original enlistment of four years and an extension of their original enlistment for a period of two years. Each of the petitioners were promised a bonus of approximately Four Thousand Dollars ($4,000.00), to be paid at the end of the original four years of service, in return for their agreement to extend their enlistments. That the bonus to be paid at the end of the original enlistment

was an inducement, the promise of which prompted the agreement to extend enlistments by each of the petitioners, is evidenced by the stipulation of facts agreed to by the United States. (App. pp. 20a-21a). That the bonus was an inducement is further evidenced in the transcript of the testimony taken at a hearing January 3, 1975, before Judge Kellam for the Eastern District of Virginia at pages 12 and 13 thereof. Petitioner, James A. Carini, testified as follows:

> Question by Mr. Bradberry:
>
> "Mr. Carini, would you have agreed to serve in the United States Navy for a period of six years had you not been promised the bonus of $4,000.00 at the end of the original four?"
>
> Answer.
>
> "No."

Thereafter, at page 13 of the transcript, the government stipulated that additional witnesses in the case, if called, would testify substantially the same as Mr. Carini.

The government prepared the printed form extension contracts signed by the petitioners. In so doing, the government could easily have inserted a provision limiting each of the petitioner's rights to the variable re-enlistment bonus by conditioning receipt of said bonus upon the continued existence of the variable re-enlistment bonus program as of the date they were to receive payment of the bonus.

> "Since one who speaks or writes can, by exactness of expression, more easily prevent mistakes in meaning than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter. . ." Williston, *Contracts,* 3rd Ed., Vol. 4, § 621 at p. 760.

It is a well settled principle of contract law that the terms of the contract are construed most strongly against the drafter of the contract. Corbin *Contracts,* Vol. 3 § 559 (1960); *Restatement of the Law of Contracts,* Vols. 1 & 2, § 236. This principle is considered especially appropriate in cases involving the United States because of the United States' vast economic resources and stronger bargaining position in contract negotiations. *United States* v. *Seckinger*, 397 U.S. 203, 216 (1970). It cannot reasonably be argued by the United States that any of the petitioners herein were in a position to negotiate better or more favorable terms than those contained in the contracts about which petitioners complain. If they wish to receive the bonus promised them in return for their extended service, they were obligated to execute the documents proffered to them by representatives of the United States Navy. The United States having selected the language of the contract must now live with it.

Contract rights against the government are property interests protected by the Fifth Amendment. Congressional power to abrogate existing government contracts is narrowly circumscribed. *Lynch* v. *United States, supra; Federal Housing Administration* v. *Darlington, Inc.*, 358 U.S. 84 (1958) (Harlan J., Dissenting); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268 (1968); *Larionoff* v. *United States, supra.*

Although Congress may constitutionally impair existing contract rights in the exercise of a paramount government power, such as war power, Congress is without power to *reduce expenditures* by abrogating contractual obligations of the United States. *Lynch* v. *United States, supra; Larionoff* v. *United States, supra,* at 25. As is noted by Judge McGowan in the *Larionoff* deci-

sion, the legislative history of the amendment to Title 37, § 308 indicates the purpose of the amendment was to save re-enlistment dollars, not to promote some paramount national interest. As Mr. Justice Brandeis stated:

> ". . . (C)ongress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts in the attempt to lessen govenment expenditure would not be the practice of economy but an act of repudiation. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation with all the wrong and reproach that term implies, as would be if the repudiator had been a State, or a municipality or a citizen."
> *Lynch, supra,* at p. 580.

CONCLUSION

Petitioners entered into a valid and binding contract with the United States Government for the payment of an enlistment bonus in return for the extension of their military service. Prior to entering into the extension period, each of the petitioners was advised that he would not receive the bonus, but that he was required to continue to serve his extened military service. Petitioners instituted suit to recover the bonus promised to them and subsequently taken away by the United States. In one Circuit Court of Appeals and six Federal District Courts, there have been determinations in favor of the enlisted men and against the United States. In the Fourth Circuit Court of Appeals, there has been a determination in favor of the United States. Numerous district court cases remain to be decided, and the history of this litigation indicates that appeals will be taken from those decisions regardless of the

results. It is thus imperative that this Honorable Court resolve the conflict in law pertaining to the facts of this case as a result of the inconsistent Court of Appeals opinions now standing. It is further imperative that this Honorable Court resolve the Fifth Amendment question of whether or not the contract rights, which were vested in petitioners herein, have been arbitrarily and capriciously abrogated by the United States Government as a cost savings measure.

The importance of the issues herein raised is heightened by the fact that the questions involved relate directly to the United States' ability to obtain and retain skilled personnel for service in the military establishment over an extended priod of time.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted in order that the significant Constitutional issues raised herein be resolved.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1695

JAMES A. CARINI, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1399

JAMES A. CARINI, et al.
Appellees,

versus

UNITED STATES OF AMERICA, et al.
Appellants.

No. 75-1400

JAMES A. CARINI, et al.
Appellants,

versus

UNITED STATES OF AMERICA, et al.
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Richard B. Kellam, District Judge

Argued June 12, 1975 Decided December 19, 1975

Before HAYNSWORTH, Chief Judge, WINTER and CRAVEN, Circuit Judges

James E. Bradberry, D. Wayne Moore, (Moore, Weaver, Moore and Bradberry, and George H. Mahler on brief) for Appellees in No. 75-1399 and Appellants in 75-1400; Neil H. Koslowe, Attorney, United States Department of Justice, (Rex E. Lee, Assistant Attorney General, Irving Jaffe, Acting Assistant Attorney General, William B. Cummings, United States Attorney, and Robert E. Kopp, Attorney, United States Department of Justice on brief) for Appellants in No. 75-1399 and for Appellees in No. 75-1400.

HAYNSWORTH, Chief Judge:

The question is the entitlement of Naval personnel to reenlistment bonuses for which there was statutory and regulatory authorization at the time they signed enlistment extension agreements, but for which they could not qualify without a further extension of their periods of service under a new statute enacted by the Congress during the term of their initial enlistment and before the extended term was reached. The district court held that the statutes in effect at the time the extension agreements were executed became a part of the contract, that the motivation for the amendment was fiscal and that it was beyond the power of the Congress to alter the agreements.

We come to a different conclusion.

Each of the plaintiffs enlisted in the Navy for a period of service of four years. At the time of enlistment, or not long thereafter, each of the plaintiffs also signed an enlistment extension agreement to serve for an additional period of two years. They did this to qualify for participation in a program of training and work in electronics or some phase of nuclear operation. The programs required extensive and costly training, because of which the Navy wished to assure itself that participants in the program would serve longer than the regular four year enlistment period.

The enlistment extension agreements recited that the sailor agreed to the extension of the period of his service "in consideration of the pay, allowances, and benefits which will accrue to me during the continuances of my service."

A part of the inducement for the extension agreements was an expectation by each that after completion of service of the initial period of four years, he would receive a "Variable Reenlistment Bonus" in addition to the regular reenlistment bonus. In 1965, the Congress had made pro-

vision for the payment of such Variable Reenlistment Bonuses to military personnel "having critical military skills,"[1] and personnel who had satisfactorily completed these programs of training were classified as possessing such skills under authorized regulations adopted by the Secretary of Defense. The amount of the bonus was calculated under a formula, so that the exact amount was not predictable at the time the reenlistment extension agreements were signed, but it is conceded that under § 308(g), each of the plaintiffs would have been entitled, at the time the reenlistment period began, to a sum ranging between $4,000 and $6,000.

In 1974, however, when each of these plaintiffs was still serving the initial four year enlistment obligation, the Congress changed the statute.[2] The revised statute contains no authorization to the Secretary of Defense to adopt regulations providing for such special bonuses. The Congress made its own statutory provision for a "Selective Reenlistment Bonus," but conditioned its payment upon the existence of a reenlistment agreement for a period of at least three years, rather than two.

The 1974 statute expressly preserves, for military personnel on active duty at the time, the right to receive the regular reenlistment bonus upon retirement,[3] but the only provision for a special or extra bonus was the new SRB, for which these plaintiffs do not qualify.

The failure to preserve the VRB for military personnel in the position of these plaintiffs was not inadvertent. The Navy specifically called the situation to the attention of Congress. The Conference Committee considered the matter, and disposed of it by saying that the SRB could be paid to such personnel if the enlistee would cancel his

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[1] 37 U.S.C.A. § 308(g).

[2] 37 U.S.C.A. § 308(a)(4).

[3] The Act of May 10, 1974, Pub. L. #93-277 § 3, 88 Stat. 119.

prior enlistment extension agreement and enter into a new extension agreement calling for a period of reenlisted service of at least two years beyond the period provided in the cancelled extension agreement. The congressional intention is thus plain. Despite the reasonable expectations of these plaintiffs, the statute in effect at the time that the reenlisment period began to run, or will begin to run, does not authorize the payment of any VRB; it does authorize the payment of an SRB, under the congressional formula but only if, during the initial enlistment period, the old reenlistment extension agreements are cancelled and new ones executed calling for a longer period of extended service.

While the district court reasoned that the 1965 statute became a part of the reenlistment agreement, we think it did not. Those agreements were said to be in consideration of the "pay, benefits and allowances which will accrue." There is no reference to a VRB. Indeed, there is no specification at all of what pay will accrue. On its face, it seems to us to mean that the enlistee will receive the pay authorized by statute and regulation from time to time as he performs his service. Indeed, the plaintiffs concede that the monthly salary they receive was not fixed at the rates in effect at the time of the contracts. It is subject to the unfettered control of the Congress. The Supreme Court has said that "a soldier's entitlement to pay is dependent upon statutory right." *Bell* v. *United States*, 366 U.S. 393, 401.

Reenlistment bonuses are a form of pay for military personnel. With respect to congressional control of the entire matter, we see no basis for distinction between a reenlistment bonus and regular rates of pay. In 37 U.S.C.A. § 101(21), "pay" is defined to include "basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances." It covers these reenlistment bonuses. A sailor has a statutory right

to receive his regular pay,[4] and he may earn "special pay" by performing certain duties or acts, including reenlistment,[5] or "incentive pay" for the performance of hazardous duty.[6] The special pay in the form of reenlistment bonuses cannot be said to be less subject to congressional control than the other forms of regular, special and incentive pay which are subject to congressional control.

Such cases as *Morse* v. *Boswell,* D.C.Md.) 289 F. Supp. 812, aff'd per curiam, 4th Cir. 401 F.2d 544, do not persuade us to the contrary. In that case the district court said that the statutes in effect at the time of enlistment were incorporated in the contract, but the relevant statute contemplated the existence of other statutes, including subsequently enacted statutes, so there was no conflict between the statutes in effect at the time of the contract and those in effect at the time the reservist was called to active duty. That is not the situation here, where the Congress deliberately changed the basis for qualification for special reenlistment bonuses.[7]

Since the parties agree that all military pay is not fixed at the time of the enlistment or reenlistment contract, we think this contract consideration clause anticipated possible statutory change.

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[4] 37 U.S.C.A. § 204.

[5] 37 U.S.C.A. §§ 302-311.

[6] 37 U.S.C.A. § 301.

[7] In *Larionoff* v. *United States,* D.D.C. 365 F. Supp. 140, 145, Navy petty officers had signed enlistment extension agreements at a time when the applicable regulations classified them as possessing critical skills and thus entitled to a special reenlistment bonus. The court held that they could not be deprived of the right to receive that bonus by an amendment of the regulations to provide that their skills were not critical. Here, of course, we deal with congressional power. While a court might reasonably hold the Navy bound by its representation, it cannot bind congressional power in areas committed to congressional discretion.

While we hold there is no enforceable contract right to the payment of the VRBs under the now repealed § 308(g), the situation of these plaintiffs is most appealing. When they executed their reenlistment agreements, they had been told of the provisions of § 308(g) and the regulations which seemingly would entitle them to the payment of the VRB. They had a reasonable expectation that they would get it, or something reasonably approximating it. While in a legal sense they must be held to an awareness that Congress might change the statutes, they could not be charged with anticipation that the Congress would so change the statute as to make them unqualified for any special bonus without an extension of their reenlistment agreements for an additional two year period, for a total of eight years service rather than of six. Their expectation of the receipt of a special enlistment bonus was a part of the inducement for their signing the reenlistment agreements, and now their expectations are frustrated. Under the circumstances, the Congress may wish to reconsider their situation and the moral claims they have against the United States.

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 75-1399/1400

JAMES A. CARINI, et al.
Appellees,

vs.

UNITED STATES OF AMERICA, et al.,
Appellants.

Order

Upon consideration of the petition for rehearing, no request for a poll of the court being made on the suggestion for rehearing *en banc*, and with the concurrence of Judge Winter and Judge Craven,

IT IS ORDERED that the petition be, and the same is hereby, denied.

FOR THE COURT

/s/ CLEMENT F. HAYNSWORTH
Clement F. Haynsworth
Chief Judge, Fourth Circuit

February 20, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

CIVIL ACTION No. 74-88-NN

JAMES A. CARINI, et als, *Plaintiffs,*

v.

UNITED STATES OF AMERICA, et al, *Defendants.*

Opinion and Order

This civil action was originally brought by numerous plaintiffs against the Secretary of Defense, the Secretary of the Navy, and various Naval officers, seeking to be released from the Navy on a writ of habeas corpus because of the government's failure to fulfill the terms of the plaintiffs' enlistment contracts. In an order entered November 21, 1974, we ruled that habeas corpus relief was inappropriate in this particular instance, and allowed the plaintiffs time to amend their complaint to state a cause of action for damages. Jurisdiction was originally based upon 28 U.S.C., § 2241, § 2201 and § 2202, and, as amended, is now predicated upon 28 U.S.C., § 1346, § 2201 and § 2202. For the reasons given below, the plaintiffs are entitled to monetary and declaratory relief as prayed for.

The plaintiffs enlisted in the Navy between June 1970 and July 1972. The time spread is not material as it appears that all signed a similarly worded enlistment contract. All contracts of enlistment were for a period of four years. Either concurrently with signing the initial enlistment contract or shortly thereafter while in "boot camp", each plaintiff signed an "Agreement to Extend Enlistment." The relevant language of the extension agreement is as follows:

> "I • • •, in consideration of the pay, allowances, and benefits which will accrue to me during the continu-

ances of my service, voluntarily agree to extend my enlistment as authorized by Section 509, of Title 10, United States Code, and the regulations issued pursuant thereto. I voluntarily agree to extend my enlistment for a period of 24 months from the date of expiration thereof, subject to the provisions and obligations of my said contract of enlistment of which this, my voluntary agreement, shall form a part. "REASON FOR EXTENSION: Training (Nuclear Field Program or Advanced Electronics (AEF) Field Program). AUTH: BUPERSMAN 1050300. I understand that this extension becomes binding upon execution and therefore may not be canceled except as set forth in BUPERSMAN 1050150."

The extensions took effect and became binding on the day they were signed.

At the time each Extension Agreement was signed, 37 U.S.C., § 308(g)(1968) was in effect.[1] Section 308(g) allowed the Secretary of the Navy to promulgate regulations whereby personnel with critical skills could either reenlist or extend their enlistment and be paid up to four times the bonus given to those who reenlisted or extended but did not possess a critical skill. It is a fact that, because of their advanced training, all plaintiffs possess a "critical skill."

On June 1, 1974, less than one month prior to the time when the two-year extensions were to begin for the first of the plaintiffs, a newly promulgated revision to 37 U.S.C., § 308 went into effect. *See* U.S. Code Cong. and Admin. News, 93rd Cong., 2nd Sess., at 897-98 (1974). The old

[1] Section 308(g) was part of the Uniformed Services Pay Increase Act, set out in U.S. Code Cong. and Admin. News, 89th Cong., 1st Sess., at 600-605 (1965). The legislative history is set out in U. S. Code Cong. and Admin. News, 89th Cong., 1st Sess., at 2756-67 (1965).

version of § 308 would have allowed each of the plaintiffs to receive a bonus of between $4,000 and $6,000 for their two-year extension of service. The old bonus was called a Variable Reenlistment Bonus. The new version of § 308 only authorized payment of a bonus of approximately $600 for a two-year extension of service. The Variable Reenlistment Bonus had been replaced by the Selective Reenlistment Bonus. Only by extending their enlistments for four years instead of two could the plaintiffs receive the $4,000-$6,000 bonus to which they believe they are entitled.

The plaintiffs now seek to recover from the defendants the amount which they would have been paid had the Variable Reenlistment Bonus not been abolished.

Although not specifically referred to in the extension agreement, 37 U.S.C., § 308 (1968) was a part of that agreement and the contract it formed. This is so by operation of law. *Morse* v. *Boswell*, 289 F. Supp. 812, 814 (D.Md.), *aff'd per curiam*, 401 F.2d 545 (4th Cir., 1968), *cert. denied*, 393 U.S. 1052 (1969). *See also Home Building and Loan Association* v. *Blaisdell*, 290 U.S. 398, 435 (1934); *Rehart* v. *Clark*, 448 F.2d 170 (9th Cir., 1970); *Goldstein* v. *Clifford*, 290 F. Supp. 275, 279 (D.N.J., 1968). Thus, the right to receive a Variable Reenlistment Bonus was an integral part of the contract formed between each plaintiff and the Navy since that was the law on the day the Extension Agreements were signed. Further, as we noted more extensively in our order of November 21, 1974, merely because a person in the military has changed his status, he does not forfeit the right to receive the benefit of his bargain as set out in the contract of enlistment.[2] *Peavy* v. *Warner*, 493 F.2d 748, 750 (5th Cir., 1974); *Matzell* v. *Pratt*, 332 F. Supp. 1010 (E.D.Va., 1971).

[2] The contract of enlistment includes the extension agreements as the language of the latter agreement merged the to documents into one contract.

The case before us falls between two lines of cases. The first line of cases holds that, in regard to the handling of military personnel, Congress has broad authority pursuant to its "War Powers." The second line of cases, completely unrelated to the first, holds that Congress does not have the authority to alter the terms of a contract between itself and other parties where the chance is effected for fiscal reasons. Since the facts presently before us involve the alteration of a contract with one in the military, we find ourselves between the two lines of reasoning. Our problem is increased because we can find no cases that even begin to discuss this dichotomy.

The government has cited two cases which have held that Congress can retroactively alter the terms of an enlistment contract pursuant to its War Powers. *Schultz* v. *Clifford,* 303 F. Supp. 963 (D.Minn. 1968); *Pfile* v. *Corcoran,* 287 F. Supp. 554 (D.Colo., 1968). *See also* United States Constitution, Art. I, Sec. 8, clauses 11, 12 and 14. Both of these cases, decided during the Vietnam conflict, concerned the narrow issue of whether Congress could retroactively alter the terms of an enlistment contract by changing the length of time the reserves could be called up from forty-five days to two years. In these cases, the plaintiffs enlisted in the reserves. Their contracts stated that, should they fail to attend a certain number of weekend drills, they would be subject to a call-up to active duty for forty-five days. After the enlistment contracts were signed, Congress, faced with manpower shortages during the Vietnam conflict, changed the period for which a dilatory reservist could be called up to two years. The courts upheld this change in the contract of enlistment as being within the Congress' War Powers of raising an army.

We feel these decisions are consistent with earlier holdings which have upheld the power of Congress to do such things as initiate a draft, *Selective Draft Law Cases,* 245 U.S. 366 (1918), and to extend the period of military

service during a war for those already in the military, *Ex parte Taylor,* 73 F. Supp. 161 (S.D.Cal., 1947). Yet, all of these cases deal only with the authority of Congress to effect the "status" of an individual *vis-a-vis* raising an army and a navy pursuant to Article I, section 8 of the Constitution. Under these powers, Congress can draft civilians, extend the service of those already in the military, and call up the reserves as Congress deems necessary. The broad reach of Congressional authority in these areas is unquestioned. *See United States* v. *O'Brien,* 391 U.S. 367 (1968). However, none of these cases deal with the problem now before us of whether Congress can retroactively alter the terms of a contract so as to reduce the amount of a bonus already agreed to.[3]

Larionoff v. *United States,* 365 F. Supp. 140 (D.D.C., 1973), held that the Secretary of the Navy cannot retroactively abolish the Variable Reenlistment Bonus by changing Naval Regulations. While we agree that many of the factual findings made by Judge Richey in *Larionoff* are appropriate here, the court's holding is not of much assistance because we feel that Congress possesses unique constitutional powers in regard to the military that the Secretary of the Navy does not possess.

Turning to the second line of cases, Congress does not have the power to retroactively alter the terms of contracts between itself and others for purely fiscal reasons. *Perry* v. *United States,* 294 U.S. 330 (1935); *Lynch* v. *United States,* 292 U.S. 571 (1934). Although neither case involved contracts of enlistment, we believe the rationale behind those decisions is applicable in the case before us. In *Lynch,* Congress attempted to cancel War Risk Insur-

[3] Congress can abolish reenlistment bonuses here the abolition has only a prospective application. Brooks v. United States, 33 F. Supp. 68 (E.D.N.Y., 1939). While Congress, in Brooks, did not abolish the reenlistment bonus, it did not require anyone to serve a term of reenlistment without a bonus.

ance contracts merely as an economy measure. The Supreme Court stated that a contract between the United States and an individual was a property right in that individual, and the government was bound as any party would be. *Lynch, supra,* at 576, 580. An attempt to cancel the insurance contracts merely as an economy measure was not within the power of Congress.

Perry v. *United States, supra* at 351, 354, supported the decision in *Lynch*. Perry had bought United States bonds which guaranteed payment in gold. The United States went off the gold standard and offered paper money to those redeeming the bonds. Although the Supreme Court did find that the government could thus alter the redemption terms of the bonds, they did so only after stating that this was permissible where the rights of the bondholder were not materially affected. Since the bonds continued to be guaranteed by the government, and the guarantee was for the full face amount of the bond, the plaintiff had not been adversely affected. We reiterate, however, the fact that, as in *Lynch,* the Supreme Court in *Perry* noted that Congress must be bound by the terms of its contracts. *Perry* at 351, 354.[4]

After closely examining the 1974 revisions to 37 U.S.C., § 308, we feel that the action taken by Congress to retroactively revoke the Variable Reenlistment Bonus was prompted by purely fiscal reasons. Accordingly, we feel that the holdings in *Lynch* and *Perry* are applicable, and not the War Power decisions of *Schultz* v. *Clifford, supra,* and *Pfile* v. *Corcoran, supra.* In reading the legislative

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[4] There are cases which hold that Congress may interfere with contracts between two persons where the government is not involved, but *Lynch* and *Perry* noted that Congress is held more strictly to the contract where the government is a party. *See* Calhoun v. Massie, 253 U.S. 170 (1920); Hamilton v. Ky. Distilleries Co., 251 U.S. 146 (1919); Hoke v. United States, 227 U.S. 308 (1913); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911).

history of the new version of § 308, we note that constant reference is made to the amounts presently being paid out in reenlistment bonuses and the savings possible under the revised, lower bonus schedule. *See* the Armed Forces Enlisted Personnel—Bonus Revision Act of 1974, U.S. Code Cong. and Admin. News, 93rd Cong. 2d Sess., at 1028-1044 (1974). Although the "Purpose of the Bill" is stated as being:

> "• • • to provide authority to grant enlistment and reenlistment bonuses to enlisted personnel on a selective basis to fill critical and shortage skill requirements in the armed forces • • •,"

the entire legislative history concerns merely the amount of money to be saved by reducing certain expenditures. While the stated "Purpose" seeks to bring the bonus cut under congressional War Powers as a measure to fill manpower shortages, we feel that the stated intent of Congress is far outweighed by the actual language of the Act, which shows that Congress' primary interest was fiscal savings. Accordingly, we feel that the decisions in *Perry* and *Lynch* are far more applicable, and Congress does not possess the authority to retroactively alter the terms of its contracts with the plaintiffs. The Variable Reenlistment Bonuses are rightfully owed to the plaintiffs and must be paid as set out below in the court's order.

For the record, we have considered two arguments put forth by the government and find both without merit. First, the doctrine of promisory estoppel is inapplicable because the plaintiffs do not rely on the improper representations of a Navy recruiter who might have promised a bonus to which the plaintiffs were not entitled. There is a distinction between the case now before us, and that of *Parker* v. *United States,* 461 F.2d 806 (Ct. Cl., 1972), cited by the government. In *Parker,* an enlistee was promised a reenlistment bonus even though the law clearly stated that no

bonus was to be given. The enlistee sued for his bonus, not based on any statutory right, but upon the promise made by someone in the Navy. The court rejected the claim as the military cannot be bound by the promises made by its personnel. In contrast, the case before us is not a suit based upon a mere promise—although a bonus was promised. The suit here is based on what the government admits was the statutory bonus due to the plaintiffs up until the time that § 308 was amended.

Secondly, the doctrine of illusory promise is not applicable because the bonus was not illusory in nature. We have already pointed out that the Variable Reenlistment Bonus was a part of the Extension Agreement, and the Extension Agreement was incorporated into the Contract of Enlistment. The extension became effective on the day it was signed, not at some time in the future. The Navy could have written a contract that stated that any change in the bonus laws would be binding on both parties, but they did not do so. *See Larionoff* v. *United States, supra. See also Johnson* v. *Powell,* 414 F.2d 1060 (5th Cir., 1969); *Winters* v. *United States,* 281 F. Supp. 289, 295 (E.D.N.Y.), *aff'd per curiam,* 390 F.2d 879 (1st Cir.), *cert. denied,* 393 U.S. 896 (1968). The mere fact that the Variable Reenlistment Bonus was not an exact sum certain is not material. The bonus was set out in a specific formula, the terms of which were most certain. In sum, we find nothing illusory about the promise of a Variable Reenlistment Bonus.

Accordingly, it is hereby ORDERED that, as to those plaintiffs who have already completed their initial four-year enlistment, the Navy proceed to pay them their Variable Reenlistment Bonus as provided by 37 U.S.C., § 308, at the time they enlisted. As to those plaintiffs who have not yet completed their initial four-year enlistment, their request for declaratory relief is hereby GRANTED, and it is ORDERED that as they enter their two-year period of extension they

be paid their Variable Reenlistment Bonus as provided by 37 U.S.C., § 308, at the time they enlisted. The formula to determine the exact amount due each man is clear. Counsel will prepare and submit to the court within fourteen (14) days an order setting forth the exact amount due each plaintiff and when it is payable.

/s/ RICHARD B. KELLAM
Richard B. Kellam
United States District Judge

At Norfolk, Virginia

January 17, 1975

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

CIVIL ACTION No. 74-88-NN

JAMES A. CARINI, et al, *Plaintiffs*

vs.

UNITED STATES OF AMERICA, et al, *Defendants*

Judgment Order

This Civil Action came on for hearing before the Court, Honorable Richard B. Kellam, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, it is ORDERED as follows:

(1) That each plaintiff listed on Schedules A and C shall be entitled to the damages set forth after his name, which damages are due and payable on the date each party begins to serve his extensions as set forth after his name on said Schedules under the column entitled "Date Extension Effective".

(2) That each plaintiff listed on Schedules B and D is entitled to damages on the date he begins to serve his extension as set forth after his name on said Schedules under the column entitled "Date Extension Effective". The said damages are to be calculated on the entitlement date in accordance with the following formula: "Variable Reenlistment Bonus Multiple in effect on the date the agreement to extend enlistment was signed, multiplied times the number of years of extension, multiplied times the base pay per month of the individual plaintiff on entitlement date equals the damages due plaintiff."

(3) That counsel of record for those plaintiffs on Schedules A and B are D. Wayne Moore and James E. Bradberry, and that counsel of record for those plaintiffs on

Schedules C and D is George H. Mahler, and that counsel of record for the plaintiffs recover from the plaintiffs as attorney fees the following:

For services rendered up to this date, a fee of ten percent of any sum due or to become due.

(4) That the defendant, the United States of America, issue all damage payments by check or other negotiable instrument made payable to each plaintiff and his attorneys(s) as designated on the Schedules attached to this Order and made a part hereof.

Dated at Norfolk, Virginia, this 3rd day of February, 1975.

/s/ RICHARD B. KELLAM
Richard B. Kellam
United States District Judge

We ask for this:

/s/ D. WAYNE MOORE
D. Wayne Moore
/s/ JAMES E. BRADBERRY
James E. Bradberry
/s/ GEORGE H. MAHLER
George H. Mahler
Attorneys for Plaintiffs

Seen: & objected to:

/s/ EDWARD R. BAIRD, JR.
Roger T. Williams
Counsel for Defendants

A TRUE COPY, TESTE: W. Farley Powers, Jr., *Clerk*
/s/ By MARILYN B. WHALEN, *Deputy Clerk*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(NEWPORT NEWS DIVISION)

CIVIL CASE No. CA-74-88-NN

JAMES A. CARINI, et al, *Plaintiffs*

vs.

UNITED STATES OF AMERICA, et al, *Defendants*

Stipulation of Facts

The respective parties hereto, by and through their counsel, hereby stipulate to the following facts:

1. An original "Enlistment Contract" (DD Form 4, 1 Apr. 68) was executed by each Plaintiff which obligated each Plaintiff for four (4) years of active duty in the United States Navy.

2. Either concurrently with enlistment, or soon thereafter, each Plaintiff executed an extension of the four-year enlistment by executing a form entitled and numbered "Agreement to Extend Enlistment," Navpers 601-1A/Navcompt 513 (Rev 9-63) and subsequent amendments, thus obligating each Plaintiff for an overall period of Naval service of six (6) years. As part of the "Agreement to Extend Enlistment" document, at the place whereupon it is printed "Reason for Extension", in most cases the "reason" typed thereupon was "Training (Nuclear Field Program or Advanced Electronics (AEF) Field Program). AUTH: BUPERSMAN 1050300. I understand that this extension becomes binding upon execution and thereafter may not be cancelled except as set forth in BUPERSMAN 1050150."

3. None of the enlistment and re-enlistment documents here relevant contains any express reference to a "Variable Re-enlistment Bonus (hereinafter "VRB"); however, the "Agreement to Extend Enlistment" form states that each Plaintiff was extending his enlistment "in consideration of the pay, allowances and benefits which will accrue to (him) during the continuance of (his) service." Some of the newer contract forms do not have the quoted language, specifically the 1969 and 1972 revisions.

4. There was in effect at the time each Plaintiff executed the "Agreement to Extend Enlistment" document aforesaid, a Federal Statute (37 U.S.C. Sec. 308 (1969)), and Department of Defense and Department of the Navy implementing regulations, which provided that servicemen who voluntarily extended their enlistments for at least two years would be entitled to a VRB payable in equal yearly installments, or in a lump sum in meritorious cases, payable during the re-enlistment period. At the time of the execution of the "Agreement to Extend Enlistment" documents relevant herein, and thereafter, each Plaintiff allegedly and apparently[1] met the criteria set forth in 37 U.S.C. Sec. 308(g) (1968) and the regulations promulgated pursuant thereto, and implementing said statute.

5. That the system of enlisting Navy personnel under an enlistment contract of four years duration, and an extension agreement of two years duration, was part of an official Navy enlistment program designed to retain Navy personnel in certain critical military occupational specialties; that the purpose of the VRB was to provide a specific and substantial monetary incentive to persons solicited for enlistment in the "4-plus-2" program; and that each of the plaintiffs herein relied upon receipt of the VRB as an inducement to extend their service.

6. That the bonuses in controversy herein generally range between $4,000.00 and $6,000.00 per Plaintiff,[1] and that the regulations in effect at the time the "Agreement

[1] The parties hereto have not yet verified each Plaintiff's status and reserve the right to do so on a case by case basis.

to Extend Enlistment" was signed, provided for one month's salary for each year of extension multiplied by four.

7. Each Plaintiff has received special training pursuant to the "Agrement to Extend Enlistment".

8. On May 10, 1974, the President signed into law Public Law 93-277 which amended 37 U.S.C. Sec. 308(g) (1968) so as to terminate the statutory authority regarding VRB.

9. Numerous Plaintiffs have completed their initial four-year enlistment and are now serving time in the Navy on their two-year extension and have not been paid any VRB.

STIPULATED TO THIS 8th day of November, 1974.

/s/ ROGER T. WILLIAMS
Roger T. Williams
Assistant United States Attorney
Counsel for Defendants

MOORE, WEAVER, MOORE & BRADBURY

/s/ By WAYNE MOORE
D. Wayne Moore

/s/ By JAMES E. BRADBERRY
James E. Bradberry
Counsel for Plaintiffs and Intervenors

/s/ By GEORGE MAHLER
George Mahler
Counsel for Intervenors

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL No. 75-0053

EARL B. COLLINS, et al., *Plaintiffs*,

vs.

JAMES R. SCHLESINGER, et al., *Defendants*.

Memorandum Decision

I. *Introduction*

On February 25, 1975, plaintiffs filed this civil action against the Secretary of Defense, the Secretary of the Navy, and various Naval officers, seeking a declaratory judgment, monetary damages, and habeas corpus relief based on the government's alleged failure to fulfill the terms of their enlistment contracts. At the March 10, 1975 hearing on an Order to Show Cause, this court ruled that plaintiffs' application for release from the Navy on a writ of habeas corpus, as set forth in the First Cause of Action in their Verified Petition and Complaint, was inappropriate in this case.

Plaintiffs subsequently filed on April 16, 1975, a motion for summary judgment on their Second Cause of Action for monetary damages. In response, the government filed a motion to dismiss, or in the alternative, for summary judgment. This decision enlarges upon the oral decision for the plaintiffs, rendered by this court at the April 29, 1975 hearing on the motions.

II. *Background Facts*

Between 1970 and 1972, each of the plaintiffs enlisted for four years of active duty in the Navy. Either concur-

rently with enlistment or shortly thereafter, each plaintiff signed an "AGREEMENT TO EXTEND ENLISTMENT" for two additional years.[1] The extension took effect, *i.e.*, became binding, on the day the agreement was signed. Each plaintiff thus became obligated for six years of Naval service.

In the AGREEMENT TO EXTEND ENLISTMENT, at the place where it was printed: "REASON FOR EXTENSION", there was typed, in most cases: "Training (Nuclear Field Program —BUBERS INST 1306.64 series) • • •."

At the time the extension agreements were signed, 37 USC 308(g) (1968), and the Department of Defense and Department of the Navy regulations promulgated thereunder, provided that personnel with a "critical skill" designation who voluntarily extended their first term of enlistment for two years were entitled to a Variable Reenlistment Bonus (VRB) worth up to four times the amount of the regular reenlistment bonus. The VRB was payable in two equal installments in each year of the extension period.

None of the enlistment and reenlistment documents executed by the plaintiffs contained any express reference to a VRB. However, each AGREEMENT TO EXTEND ENLISTMENT stated that each plaintiff was extending his enlistment "in consideration of the pay, allowances, and benefits which will accrue to [him] during the continuances of [his] service • • •."

On May 10, 1974, the President signed into law, Public Law 93-277 which amended 37 U.S.C. 308 et seq. and repealed the Navy's authority to pay the VRB after June 1, 1974. Under the old version of Section 308 plaintiffs would have received between $4,000 and $6,000 for their two-year extension of service. Section 308, as amended, now authorizes a Selective Reenlistment Bonus (SRB)

[1] Plaintiff Douglas Mulder signed a four year enlistment contract with provisions of one and two year extensions.

which is far less than the $4,000 to $6,000 amounts which plaintiffs claim they are entitled to receive for their extension of service.

III. *Legal Issues*

In moving for summary judgment plaintiffs contend that *Carini* v. *United States*, No. 74-NN (E.D. Va., February 3, 1975), and *Larionoff* v. *United States*, 365 F. Supp. 140 (1973), should be deemed controlling. In response, and in support of its motion to dismiss, or in the alternative, for summary judgment, the government has posited four basic arguments.

The government first argues that plaintiffs' action is barred by the doctrine of sovereign immunity. This court, however, finds the issue well-settled that this action may be maintained under the Tucker Act, 23 U.S.C. 1346(a)(2). *Carini, supra,* and *Larionoff, supra* at 144.[2]

The government's second argument is that the VRB was not a part of the consideration for plaintiffs' agreements to extend enlistment. The government maintains that according to the plain terms of the contract, what the Navy agreed to provide in exchange for plaintiffs' extensions was special training which qualified plaintiffs to receive pay in accordance with their rank and training,

[2] The Tucker Act gives the District Courts original jurisdiction, concurrent with the Court of Claims, over any claim against the United States not exceeding $10,000 in amount, founded upon any express or implied contract with the United States. In 1954 Congress amended Section 1346(d)(2) to delete the provision which heretofore prohibited district courts from hearing claims or civil actions to recover fees, salary, or compensation for official services of officers or employees of the United States. In this action to recover reenlistment bonuses, which the plaintiffs maintain is included in the consideration—pay, allowances, and benefits—delineated in their reenlistment contracts, this court concludes that plaintiffs have made a prima facie case that this action is founded upon a contract for compensation between the United States and its employees.

and also provided them with a very attractive skill which would later place them in great demand in the civilian community.

From the specific words of the contract there can be no doubt that the special training was an important part of the bargained-for consideration. However, the absence of any express reference to the VRB in the reenlistment contract is not conclusive on the real issue of whether both the Navy and the enlistees intended the VRB to be included in the "pay, allowances, and benefits" that was expressly bargained for in the contract.

The government cannot deny that the VRB was a mainstay feature in the Navy's reenlistment program. In testimony before Congress on the proposed revision of the VRB program, Lt. General Leo L. Benade, Deputy Assistant Secretary of Defense, Military Personnel Policy, admitted that "the record shows clearly that it [the VRB] has been *our most effective retention feature* • • •." (Emphasis added.) Hearings on S. 2770 and S. 2771 Before the Senate Committee on Armed Services, 93rd Congress, 1st Session, p. 22 (1973). This court further notes that at the time plaintiffs executed their reenlistment contracts the statutory definition of "pay" included the VRB as a form of "special pay." See 37 U.S.C. 101(21) and 308. If the government had intended to exclude the VRB as part of the bargained-for "pay, allowances, and benefits", it could have drafted a specific exclusion in the contract. Here must be applied the elemental rule that a contract must be construed most strongly against its author, which, in this case, was the government. *Larionoff, supra* at 146.

Based on these considerations, this court finds that although 37 U.S.C. 308 (1968) was not specifically referred to in the extension agreement form, it was a part of that agreement by operation of law. *Carini, supra* at 3-4; *Larionoff, supra* at 145. See *Rehart* v. *Clark*, 448 F.2d 170 (9th Cir. 1970). Therefore, the right to receive the VRB

was an integral part of the contract formed between each plaintiff and the Navy, inasmuch as that was the status of the law on the day each contract was signed.

The government's third argument is that the VRB was not part of the statutory pay which servicemen automatically became entitled to receive upon reenlisting. Here the government emphasizes the phrase "may be paid" in maintaining that the statutory purpose of 37 U.S.C. 303(g) was to provide the Navy with a flexible program for attracting and retaining adequate numbers of highly qualified personnel as careerist shortages in critical skill classifications developed. Given this statutory purpose, the government contends that plaintiffs' eligibility to receive the VRB attached not when the extension agreements were actually signed, but only when the plaintiffs actually began serving the extension and only if they had a rating or Navy Enlistment Code (NEC) then currently designated as critical.

This court cannot concur with this loose reading of 37 U.S.C. 308(g) (1968) by which the Navy now seeks to dishonor its contractual obligation to pay the VRB after plaintiffs had been baited thereby into signing on for reenlistment. As Judge Richey found in *Larionoff*:

> The VRB was intended to induce first term reenlistment among those with such classified skills to insure the Navy maintained an adequate number of personnel in these areas. *At the time the Plaintiffs signed their reenlistment contracts, the Navy was paying the VRB for this purpose. The Navy was thus benefiting from a guaranteed supply of personnel in critical areas.* The Plaintiffs committed themselves to a total of six years in one of these critical skills which was receiving the VRB. *If the Plaintiffs were bound to the reenlistment contract from the moment of its execution, then mutuality of agreement requires that the Defendants be likewise bound.* (Emphasis added.)

> The cardinal rule of contract law that comes into play when analyzing the language of a written instrument is that the document must be considered in light of the situation and relationship of the parties, the circumstances surrounding them *at the time of the contract,* and the nature of the subject-matter and the apparent purpose of the contract. (Citations omitted.) 365 F.Supp. at 145.

Applying this rule to the facts in the instant case, this court finds that plaintiffs' "eligibility" for receiving the VRB's attached or vested upon the execution of the extension agreements. This court also finds that those requirements affecting plaintiffs' qualifications for receiving payment of the VRB in the reenlistment period—*e.g.,* training and conduct record—were conditions subsequent and not conditions precedent for establishing plaintiffs' entitlement to the VRB.

The government's last argument is that plaintiffs' contractual rights to the VRB were subject to Congress' plenary power to change the pay, allowances, and benefits of servicemen. The government contends that in the area of military pay common law rules governing private contracts have no application because a serviceman's entitlement to pay is dependent upon a statutory right, which in this case was changed by the 1974 revision of Section 308.

With respect to Congress' power to make *retroactive* changes in the terms of servicemen's contracts, this court agrees with Judge Kellam's well-reasoned analysis in *Carini* of Congress' limited authority to make such changes. After examining the legislative background for the 1974 revision of Section 308 and the government's moving papers and documents submitted in the instant case, this court finds that Congress' decision to revoke the VRB was prompted by purely fiscal reasons and not by

considerations incident to its war powers. Therefore, this court holds that Congress did not possess the authority to alter retroactively the terms of plaintiffs' contracts with the Navy, that the VRB's are rightfully owed to plaintiffs and must be paid, as hereinafter ordered.

Plaintiffs' motion for summary judgment is hereby GRANTED, and the government's motion to dismiss, or in the alternative, for summary judgment is hereby DENIED.

The record shows that at the time each plaintiff entered into a contract for reenlistment he was entitled to receive a VRB computed by that method set out in Department of Defense Military Pay and Allowances Entitlements Manual, Part I, Chapter 9. For those plaintiffs who began serving their reenlistment after June 1, 1974, as well as those who have not yet begun serving their reenlistment to date, the multiple to be used in computing their VRB shall be the last effective VRB multiple assigned to their respective NECs prior to June 1, 1974. This court believes that this method of computation most fully and fairly comports with the Navy's custom and usage in administering the VRB program and the plaintiffs' understanding, at the time they executed their extension agreements, of how the VRB multiple would be determined.

Because of pending factual questions concerning the eligibility of Roland C. Vetter, Donald E. Emel, Louis G. Leonard, and Douglas E. Mulder, the cases of these plaintiffs are hereby severed and will be the subject of a separate order.

Plaintiffs are entitled to receive their costs, as filed herein, in the amount of $243.00.

DATED: Honolulu, Hawaii, this 29th day of May, 1975.

/s/ ILLEGIBLE
Illegible
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL No. 75-0053

EARL B. COLLINS, et al., *Plaintiffs*,

v.

JAMES R. SCHLESINGER, et al., *Defendants*.

Memorandum Decision and Amended Judgment

On May 29, 1975, this court issued a decision and subsequently entered a Judgment on June 9, 1975, on behalf of plaintiffs, granting plaintiffs' Motion for Summary Judgment and denying the government's Motion to Dismiss, or in the Alternative, For Summary Judgment. Thereafter, plaintiffs filed a Motion for Relief from Judgment on August 8, 1975, maintaining that the multiple used in computing the VRB of the respective plaintiffs should be the multiple in effect at the time of a plaintiff's enlistment.

At the hearing of October 10, 1975, on this motion for relief, this court was convinced that each of the plaintiffs had been led to believe that they would receive, upon reenlistment, the multiple in effect at the time each executed his extension agreement. The evidence indicated that if the multiple were to be the VRB multiple in effect at the time they began serving their reenlistment, some would receive no VRB at all. The "carrot" would be completely removed and only the "stick" would remain. This result certainly could never have been contemplated by the contracting parties at the time the extension agreements were signed.

Plaintiffs' Motion for Relief is GRANTED, and that portion of this court's Memorandum Decision of May 29, 1975, beginning with line 30 on page 6 thereof, and ending on line 12 on page 7, is hereby amended to read as follows:

"The record shows that at the time each plaintiff entered into a contract for reenlistment he was entitled to receive a VRB computed by that method set out in Department of Defense Military Pay and Allowances Entitlements Manual, Part I, Chapter 9. For those plaintiffs who began serving their reenlistment after June 1, 1974, as well as those who have not yet begun serving their reenlistment to date, the multiple to be used in computing their VRB shall be the multiple in effect on the date that each plaintiff executed his extension of reenlistment agreement. This court believes that this method of computation most fully and fairly comports with the Navy's representations and the plaintiffs' understanding, at the time they executed their respective extension agreements, of how the VRB multiple would be determined." All other portions of the Memorandum Decision of May 29, 1975, remain unchanged.

IT IS ADJUDGED THEREFORE that the Memorandum Decision dated May 29, 1975, be and hereby is amended to conform to this Memorandum Decision.

DATED: Honolulu, Hawaii, December 9, 1975.

/s/ MARTIN PENG
Martin Peng
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL 74-1585-ALS

JOHN C. ADAMS, JR., et al., *Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*.

[Filed September 16, 1975. Clerk, U.S. District Court]

Findings of Fact and Conclusions of Law

Plaintiffs' Motion for Summary Judgment having come on regularly before this court for hearing on June 2, 1975, before the Honorable Albert Lee Stephens, Jr., United States District Judge, and with plaintiffs appearing through their counsel Garfield & Tepper by Scott J. Tepper, Esq., and defendant appearing through its counsel William D. Keller, United States Attorney, by Stephen D. Petersen, Esq., Assistant United States Attorney, and the court having considered the pleadings, exhibits, and arguments of counsel the court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is a consolidated action by numerous enlisted members of the United States Navy who request that this court award them money damages under the Tucker Act, 28 U.S.C. § 1346.

2. At the time of the filing of this action, all plaintiffs resided in and were assigned and attached to naval installations or vessels located or home-ported in Long Beach, California, and within the geographical jurisdiction encompassed by this court.

3. Between 1970 and 1973, each plaintiff enlisted in the United States Navy for a period of four years. At various times soon after commencement of active duty, each plaintiff was also induced and voluntarily agreed to reenlist in the Navy for an additional two years, said reenlistment to commence upon expiration of the original four-year enlistment. Each plaintiff thereupon executed a Navy form known as "AGREEMENT TO EXTEND ENLISTMENT." The "extension" was to become binding on the day on which the "AGREEMENT TO EXTEND ENLISTMENT" form was signed.

4. In the "AGREEMENT TO EXTEND ENLISTMENT" form, at the place where it was printed: "REASON FOR EXTENSION" there was typed, in most cases: "Training [either Nuclear Field Program or Advanced Electronics Program]."

5. At the time the "AGREEMENT TO EXTEND ENLISTMENT" forms were executed by plaintiffs herein, 37 U.S.C. § 308 (g) (1968), and Department of Defense Directives and Department of the Navy Regulations promulgated thereunder, provided that personnel with "critical skill" designations who voluntarily extended their first term of enlistment for two years were entitled to a Variable Reenlistment Bonus (VRB) worth up to four times the amount of the regular reenlistment bonus.

6. None of the enlistment and reenlistment documents executed by plaintiffs herein contained any express reference to VRB. However, each "AGREEMENT TO EXTEND ENLISTMENT" stated that each plaintiff was extending his enlistment "in consideration of the pay, allowances and benefits which will accrue to [him] during the continuances of [his] service."

7. Each plaintiff listed on the schedule attached to the Judgment herein who has entered his reenlistment or extension period has completed each and every obligation required of him under his original enlistment contract and the "AGREEMENT TO EXTEND ENLISTMENT" in order to

maintain eligibility for payment of a VRB under the Navy's VRB-implementing regulations as they existed on May 31, 1974. Each plaintiff listed on the schedule attached to the Judgment herein who has not yet completed the term of his original enlistment contract has been complying with each and every obligation required of him under his original enlistment contract and the "AGREEMENT TO EXTEND ENLISTMENT" in order to maintain eligibility for payment of a VRB under the Navy's VRB-implementing regulations as they existed on May 31, 1974.

8. The reenlistment which each plaintiff agreed to undertake is a reenlistment for the purposes of a reenlistment bonus in general, and the VRB in particular.

9. There was in effect, at the time each plaintiff originally enlisted in the United States Navy, and executed the "AGREEMENT TO EXTEND ENLISTMENT," federal law which would have permitted the Navy to enlist each plaintiff herein for a period of six consecutive years, without "break," "extension" or "reenlistment." However, in the case of these plaintiffs, the Navy chose not to solicit such enlistments, but chose instead to enlist these plaintiffs for certain, shorter original enlistment terms coupled with a specific additional term of reenlistment. One reason for the selection of this method of enlistment and reenlistment was to enable the plaintiffs to become eligible for the Variable Reenlistment Bonuses.

10. On June 1, 1974, Public Law 93-277 took effect, repealing the then-existing provisions of 37 U.S.C. § 308(g) (1968), and terminating, in the opinion of the Navy, the statutory authority to pay Variable Reenlistment Bonuses to men who commenced their initial enlistments under the VRB program on and after June 1, 1974.

11. Some of the plaintiffs herein have requested that the Department of the Navy rescind their "AGREEMENT TO EXTEND ENLISTMENT" documents and to discharge them at

the end of their four-year enlistments. The Navy has refused to rescind and has taken the position that while it is not statutorily authorized to pay VRB to these plaintiffs—and will not do so—it also is not required to rescind the "AGREEMENT TO EXTEND ENLISTMENT" documents of these plaintiffs—and will not do so. On January 27, 1975, this court entered final judgment on plaintiffs' consolidated petitions, denying their requested writs of *habeas corpus* (and ancillary mandamus and declaratory relief).

12. Each plaintiff is now entitled to be paid, or will become entitled to be paid upon termination of his original enlistment, damages equivalent to the Variable Reenlistment Bonus each plaintiff would have received pursuant to the applicable provisions of 37 U.S.C. § 308 as they existed prior to the 1974 amendment. The damages due each plaintiff are to be determined in accordance with paragraph (1)(a) of the Judgment entered herein.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this action under 28 U.S.C. § 1346(a)(2); consolidation and joinder of actions is permissible under the Federal Rules of Civil Procedure, F.R.Civ.P. Rule 20. Venue is proper as to the named plaintiffs.

2. "Claims that enlistment contracts have been breached are decided under traditional notions of contract law." *Peavy* vs. *Warner*, 493 F. 2d 748, 750 (5th Cir. 1974); *Crane* vs. *Coleman*, 389 F. Supp. 22 (E.D. Pa. 1975).

3. "The enlistment instrument and the statutory law in effect when it was signed constitute the enlistment contract." *Goldstein* vs. *Clifford*, 290 F. Supp. 275, 279 (D. N.Y. 1968); *see also Larionoff* vs. *United States*, 365 F. Supp. 140 (D. D.C. 1973). Likewise, valid regulations promulgated pursuant to statute have "the force and effect of laws" and "are read into [enlistment] contracts in

order to fix the rights and obligations of the parties." *Rehart* vs. *Clark*, 448 F. 2d 170, 173 (9th Cir. 1971). Bureau of Personnel Instruction 1133.18 *series* is merged into each plaintiff's reenlistment agreement and is a part of the reenlistment contract."

4. "The fact that the enlistee has changed his status means he cannot through [his own] breach of the contract throw off his status. But change of [his] status does not invalidate the contractual obligations of either party. . ." *Pfile* vs. *Corcoran*, 287 F. Supp. 554 (D. Colo. 1968).

5. "[T]he right to receive the VRB [Variable Reenlistment Bonus] was an integral part of the contract formed between each plaintiff and the Navy, inasmuch as that was the status of the law on the day each contract was signed." *Collins* vs. *United States*, Civil No. 75-0053 (D. Hawaii, May 29, 1975) (slip op. at p. 4). *Accord: Larionoff* vs. *United States, supra*; *Carini* vs. *United States*, No. 74-88-NN (E.D. Va. 1975).

6. Although "under certain circumstances the legislature has the power, as an attribute of sovereignty, to enact laws which alter existing contract . . . this power to pass laws retroactively is not an unqualified one . . . [and may not be exercised] merely with the aim of cutting Government expenditures." *Pfile* vs. *Corcoran, supra*, at 559; *cf. Lynch* vs. *United States*, 292 U.S. 571 (1934); *Perry* vs. *United States*, 294 U.S. 330 (1935). This being the case, this court interprets Public Law 93-277 in such a manner as to save its constitutionality, and holds that the said Public Law, as a matter of interpretation, cannot abrogate the contractual rights of plaintiffs herein.

7. "Congress' decision to revoke the VRB [here] was prompted by purely fiscal reasons and not by considerations incident to its war powers. Therefore . . . Congress did not possess the authority to alter retroactively the terms of plaintiff's contracts with the Navy, [and] the

VRB's are rightfully owed to plaintiffs and must be paid." *Collins* vs. *United States, supra* (slip op. at p. 6).

8. Plaintiffs are entitled, as a matter of law, to summary judgment. *Carini* vs. *United States, supra; Collins* vs. *United States, supra.*

9. Plaintiffs are entitled to the relief that they seek. As to those plaintiffs who have commenced reenlistment, a settled order shall be entered awarding each plaintiff money damages equivalent to the Variable Reenlistment Bonus which he was promised, and which he would have been lawfully entitled to receive upon his reenlistment. As to those plaintiffs whose four-year term of original enlistment has not yet expired, appropriate declaratory relief shall be entered. The variable multiplier in effect on the date of each plaintiff's execution of the "AGREEMENT TO EXTEND ENLISTMENT" shall be utilized to determine his VRB in this action. *See Larionoff* vs. *United States, supra; Carini* vs. *United States, supra.*

10. Any conclusion of law deemed to be a finding of fact, or *vice versa*, shall be appropriately incorporated into the findings of fact or conclusions of law, as the case may be.

DATED: Sept. 16, 1975.

/s/ ALBERT L. STEPHENS, JR.
Albert L. Stephens, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 74-1585-ALS

JOHN C. ADAMS, JR., et al., *Plaintiffs,*

v.

UNITED STATES OF AMERICA, *Defendant.*

[Filed Sept. 16, 1975. Clerk, U.S. District Court, Central District of California]

Judgment

Defendant's Motion to Dismiss, and Cross-Motions for Summary Judgement having come regularly before this Court for hearing on June 2, 1975, before the Honorable ALBERT LEE STEPHENS, Jr., Chief District Judge, and with Plaintiffs appearing through their counsel, GARFIELD & TEPPER, by Scott J. Tepper, and Defendant appearing through its counsel, WILLIAM D. KELLER, United States Attorney, by Stephen D. Petersen, Assistant United States Attorney, and the Court having thoroughly considered the pleadings, exhibits, affidavits and other papers on file herein, and the issues having been duly heard and the Court having held additional hearings on June 30, 1975 and August 25, 1975, and based upon the Findings of Fact and Conclusions of Law filed herein,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby entered in favor of Plaintiffs as follows:

(1)(a) That each Plaintiff listed on the schedules attached hereto shall be entitled to damages equal to twice each Plaintiff's monthly base pay as of the date set forth on the schedules at column 3 after each Plaintiff's name,

multiplied by the factor set forth on the schedules at column 2 after each Plaintiff's name.

PROVIDED, that no Plaintiff who has or will receive a Selective Reenlistment Bonus shall be entitled to damages herein if the period of obligation for which the Selective Reenlistment Bonus was, or is to be, paid includes the period of obligation which has been the subject of this action.

This judgment is without prejudice to, and does not affect, any subsequent claim for recoupment which Defendant may make should any Plaintiff fail to fulfill his enlistment obligation.

(b) Damages shall be payable in the following manner:

In the cases of those Plaintiffs who will have entered the second year of their reenlistment period by the date on which this judgment is entered, or the date on which this judgment is final on appeal, if an appeal is taken herefrom, whichever date is the later, damages shall then be due and payable. As for all other Plaintiffs, their damages shall be payable in two equal annual installments, the first payment to become due on the very next day following the dates set forth on the schedules at column 3 after each such Plaintiff's name, and the second payment to become due one calendar year thereafter.

2. That damage payments shall be paid by Defendant United States of America to the Clerk of this Court; thereafter, the fund thereby created shall be administered as the Court shall direct so as to effectuate the judgment.

3. That Plaintiffs shall be entitled to their costs in the amount of $97.90.

4. The execution of this judgment is hereby stayed for a period of sixty (60) days, or if an appeal is taken herefrom, during the pendency of such appeal.

Dated this 16th day of September, 1975.

/s/
Chief United States District Judge

PRESENTED BY:

GARFIELD & TEPPER

By: /s/ SCOTT J. TEPPER
Scott J. Tepper

Attorneys for Plaintiffs

APPROVED AS TO FORM:

WILLIAM D. KELLER
United States Attorney
Central District of California
FREDERICK M. BROSIO, Jr.
Assistant U.S. Attorney
Chief, Civil Division

By /s/
STEPHEN D. PETERSON
Assistant U.S. Attorney

Attorneys for Defendant

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 74-1585-ALS

JOHN C. ADAMS, JR., et al., *Plaintiffs,*

v.

UNITED STATES OF AMERICA, *Defendant.*

Stipulation to Amend Judgment Nunc Pro Tunc (Rule 60(b)(6) F.R.Civ.P.) and Order Thereon

IT IS HEREBY STIPULATED by and between the parties, through their respective undersigned counsel, that the Judgment entered herein on September 17, 1975 shall be amended, nunc pro tunc, to that date pursuant to Rule 60 (b)(6), F.R.Civ.P., in the following respects:

1. (a) That the plaintiffs whose names are set forth on the attached schedule whom counsel for the parties inadvertently failed to include on their proposed judgments, be included in the Final Judgment of this Court, and that the dates of entitlement and of variable multiplier as set forth on the schedule next to their names accurately reflect their entitlement based upon the Court's Findings Of Fact and Conclusions Of Law filed herein on September 16, 1975.

(b) Defendant however repeats all its prior objections to said Findings Of Fact And Conclusions Of Law and said Judgment as to any plaintiff affected by this stipulation, and defendant does not by this stipulation abandon any prior position in the action nor waive any rights to appellate review of the Court's Amended Judgment. Specifically, but without limitation, defendant contends that, as to the following plaintiffs, the proper variable multiplier should be two, for the reasons expressed in Defendant's

Supplemental Memorandum On The Proposed Judgments filed herein on August 20, 1975.

(1) Richard G. Ferranti

(2) Bryan R. Fitzpatrick

(3) Stephen J. Foglio

2. That the complaints of all named plaintiffs whose names are not set forth on the schedule attached to the Judgment entered September 17, 1975, or on the schedule attached hereto, be dismissed forthwith and without prejudice.

DATED: This 4th day of November, 1975.

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U.S. Attorney
Chief, Civil Division

/s/ STEPHEN D. PETERSEN
Stephen D. Petersen
Assistant U.S. Attorney
Attorneys for Defendant.

DATED: This 4th day of November, 1975.

GARFIELD & TEPPER
By /s/ SCOTT J. TEPPER
Scott J. Tepper
Attorney at Law
Attorneys for Plaintiffs.

ORDER

IT IS SO ORDERED:
This 11th day of November, 1975.

ALBERT LEE STEPHEN, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL No. 75-0062-N

ROY W. AIKEN, et al., *Plaintiffs*,

v.

UNITED STATES OF AMERICA, et al., *Defendants*.

Findings of Fact and Conclusions of Law

Plaintiffs' Motion for Summary Judgment having come on regularly before this Court for hearing on June 16, 1975, before the Honorable Leland C. Nielsen, United States District Judge, and with plaintiffs appearing through their counsel, Garfield & Tepper, by Scott J. Tepper, and defendants appearing through their counsel, Harry D. Steward, United States Attorney, by Michael E. Quinton, Assistant United States Attorney, and the Court having considered the pleadings, exhibits, and arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is a consolidated action by numerous enlisted members of the United States Navy who pray, *inter alia*, that this Court award them money damages under the Tucker Act, 28 U.S.C. § 1346(a)(2) for breach of contract.

2. At the time of the filing of this action, all plaintiffs resided in and/or were assigned and attached to naval installations or vessels located or home-ported in San Diego, California, and within the geographical jurisdiction encompassed by this Court.

3. Between 1970 and 1974 each plaintiff enlisted in the United States Navy for a period of three or four years. At various times soon after commencement of active duty, each plaintiff was also induced and voluntarily agreed to reenlist in the Navy for an additional two or three years,

said reenlistment to commence upon expiration of the original three- or four-year enlistment. Each plaintiff thereupon executed a Navy form known as "AGREEMENT TO EXTEND ENLISTMENT." The "extension" was to become binding on the day on which the "AGREEMENT TO EXTEND ENLISTMENT" form was executed.

4. In the "AGREEMENT TO EXTEND ENLISTMENT" form, at the place where it was printed: "REASON FOR EXTENSION" there was typed: "Training [either Nuclear Field Program or Advanced Electronics Program or some other area]."

5. At the time on the "AGREEMENT TO EXTEND ENLISTMENT" forms were executed by plaintiffs herein, 37 U.S.C. § 308(g) (1968), and Department of Defense Directives and Department of the Navy Regulations promulgated thereunder, provided that personnel with "critical skill" designations who voluntarily extended their first term of enlistment for two or three years and began serving their reenlistments were entitled to a Variable Reenlistment Bonus (VRB) worth up to four times the amount of the regular reenlistment bonus (and up to twelve times the amount of each plaintiff's monthly pay on the date on which his or her original enlistment expired).

6. None of the enlistment and reenlistment documents executed by plaintiffs herein contain any *express* reference to VRB. However, each "AGREEMENT TO EXTEND ENLISTMENT" stated that each plaintiff was extending his or her enlistment "in consideration of the pay, allowances and benefits which will accrue to [him or her] during the continuances of [his or her] service."

7. Each plaintiff listed in Schedule 1 of the Judgment herein has completed each and every obligation required of him or her to perform under his original enlistment contract and the "AGREEMENT TO EXTEND ENLISTMENT" in order to main his or her eligibility for payment of VRB as required under the Navy's VRB-implementing regulations as they existed as of May 31, 1974; each plaintiff

listed on Schedule 2 of the Judgment herein has not yet completed the term of his or her original enlistment contract, but each of those plaintiffs has been plying with each and every obligation required of him or her to perform under the original enlistment contract and the "AGREEMENT TO EXTEND ENLISTMENT" in order to maintain eligibility for payment of VRB as required under the Navy's VRB-implementing regulations as they existed as of May 31, 1974.

8. The reenlistment which each plaintiff agreed to undertake is a reenlistment for the purposes of a reenlistment bonus in general, and the VRB in particular. The Navy's use of the term "extension of enlistment" is synonymous with the term "reenlistment" for all purposes herein.

9. There was in effect, at the time each plaintiff originally enlisted in the United States Navy, and executed the "AGREEMENT TO EXTEND ENLISTMENT," a federal law which would have permitted the Navy to enlist each plaintiff herein for a period of six consecutive years, without "break," "extension" or "reenlistment." However, in the case of these plaintiffs, the Navy chose not to solicit such enlistments, but chose instead to enlist these plaintiffs for certain, shorter original enlistment terms coupled with a specific additional term of reenlistment. An express purpose of the Navy's selection of this method of enlistment and reenlistment was to insure that each plaintiff would be entitled to payment of VRB upon commencement of each plaintiff's reenlistment.

10. On June 1, 1974, Public 93-277 took effect, repealing the then existing provisions of 37 U.S.C. § 308(g) (1968). It is the Navy's position that its statutory authority to pay VRB to otherwise eligible sailors who commenced their initial reenlistments under the VRB program on or after June 1, 1974 was terminated. However, Public Law 93-277 and the amendments worked by the said law do not explicitly *prohibit* payment of VRB to sailors such as plaintiffs herein.

11. Many of the plaintiffs herein have requested that the Department of the Navy rescind, terminate or cancel their "AGREEMENT TO EXTEND ENLISTMENT" documents and discharge them at the end of their original enlistments. The Navy has refused to rescind, terminate or cancel, and has taken the position that while it is not statutorily authorized to pay VRB to these plaintiffs—and will not do so—it also is not required to rescind, terminate or cancel the "AGREEMENT TO EXTEND ENLISTMENT" documents of these plaintiffs—and will not do so. Plaintiffs' consolidated Petitions for Writs of Habeas Corpus are currently before this Court.

12. Each plaintiff is now entitled to be paid, or will become entitled to be paid upon termination of his original enlistment, a "Variable Reenlistment Bonus" equal to eight to twelve times the current monthly salary of each plaintiff—said bonus being listed on Schedule 1 of the Judgment for each respective plaintiff—or four to twelve times the monthly salary on the effective date of the commencement of the reenlistment of each plaintiff—said bonus being listed on Schedule 2 of the Judgment for each respective plaintiff.

13. The Court finds that the factual situation presented by intervening plaintiff Henry D. Ruble, as alleged in his original petition (75-0272-N, prior to intervention in this cause) is virtually identical to the factual situation herein, and the Findings of Fact herein are applicable to said intervening plaintiff.

14. The Court finds further that the factual situation presented by intervening plaintiff Harry I. Scarborough, III, as alleged in his original petition (74-585-N, prior to intervention in this cause) differs materially from the factual situation herein, and the Findings of Fact herein are not applicable to said intervening plaintiff.

CONCLUSIONS OF LAW

1. The Court accepts jurisdiction of this action under 28 U.S.C. § 1346(a)(2); consolidation and joinder of actions and claims is permissible under Rules 18 & 20, F.R. Civ.P. Venue is proper as to all named plaintiffs.

2. "[C]laims that enlistment contracts are invalid or have been breached are decided under traditional notions of contract law." *Peavy* v. *Warner*, 493 F.2d 748, 750 (5th Cir. 1974). *See also Crane* v. *Coleman*, 389 F. Supp. 22 (E.D.Pa. 1975); *Bemis* v. *Whelan*, 341 F. Supp. 1280 (S.D. Cal. 1972).

3. "The enlistment instrument and the statutory law in effect when it was signed constitute the enlistment contract." *Goldstein* v. *Clifford*, 290 F. Supp. 275, 279 (D.N.J. 1968). *See also Larionoff* v. *United States*, 365 F. Supp. 140 (D.D.C. 1973). Likewise, valid regulations promulgated pursuant to statute have "the force and effect of law" and "are read into [enlistment] contracts in order to fix the rights and obligations of the parties." *Rehart* v. *Clark*, 448 F.2d 170, 173 (9th Cir. 1971). Bureau of Personnel Instruction ("BUPERSINST") 1133.18 *series* is merged into each plaintiff's reenlistment agreement and is a part of the reenlistment contract.

4. "The fact that the enlistee has changed his status means he cannot through breach of the contract throw off this status. But change of status does not invalidate the contractual obligations of either party . . . ." *Pfile* v. *Corcoran*, 287 F. Supp. 554, 556-57 (D. Colo. 1968).

5. The right to receive the [Variable Reenlistment Bonus] was an integral part of the contract formed between each plaintiff and the Navy, inasmuch as that was the status of the law on the day each contract was signed." *Collins* v. *United States*, —— F. Supp. ——, (D. Hawaii, May 29, 1975) (slip op. at p. 4) *Accord: Carini* v. *United States*, —— F. Supp. —— (E.D.Va. 1975); *Larionoff* v. *United States*, 365 F. Supp. 140 (D.D.C. 1973).

6. Although "[u]nder certain circumstances the legislature has the power, as an attribute of sovereignty, to enact laws which alter existing contracts, . . . this power to pass laws retroactively affecting contracts is not an unqualified one . . . [It may not be exercised] merely with the aim of cutting Government expenditures . . . ." *Pfile* v. *Corcoran*, 287 F. Supp. 554, 559 (D. Colo. 1968). This being the case, this Court interprets Public Law 93-277 in such a manner as to save its constitutionality, and holds that the said Public Law cannot, as a matter of interpretation, abrogate the contractual rights of plaintiffs herein. To read Public Law 93-277 otherwise would render it constitutionally infirm. *See also Lynch* v. *United States*, 292 U.S. 571 (1934).

7. "Congress' decision to revoke the VRB was prompted by purely fiscal reasons and not by considerations incident to its war powers. Therefore . . . Congress did not possess the authority to alter retroactively the terms of plaintiffs' contracts with the Navy, [and] the VRBs are rightfully owed to plaintiffs and must be paid . . . ." *Collins* v. *United States*, —— F. Supp. —— (D. Hawaii, May 29, 1975) (slip op. at p. 6).

8. Plaintiffs herein, except for intervenor Harry I. Scarborough III, are entitled, as a matter of law, to summary judgment. *Adams* v. *United States*, CV74-1585-ALS (motion for summary judgment *granted* June 2, 1975) (C.D. Cal.); *Collins* v. *United States*, *supra*; *Carini* v. *United States*, —— F. Supp. —— (E.D. Va., 1975). The case of intervenor Scarborough is hereby severed from this action and will be the subject of a separate order at the appropriate time.

9. Plaintiffs are entitled to the money damages relief that they seek. As to those plaintiffs who have commenced reenlistment, a settled order shall be entered awarding each plaintiff money damages equivalent to the Variable Reenlistment Bonus he or she was promised and would

have received but for the breach of contract by defendants herein; as to those plaintiffs whose three or four-year terms of original enlistment have not yet expired, appropriate declaratory relief shall be entered. The variable multiplier in effect on the date on which each respective plaintiff executed the "AGREEMENT TO EXTEND ENLISTMENT" shall be utilized to determine the amount of money damages to which each plaintiff is or will become entitled. *See Carini* v. *United States*, —— F. Supp. —— (E.D. Va. 1975); *Larinoff* v. *United States*, 365 F. Supp. 140 D.C.C. 1973).

10. Plaintiffs have an adequate remedy at law through the award of money damages. Habeas corpus relief, therefore, is not an appropriate form of relief under the circumstances.

11. Any conclusion of law deemed to be a finding of fact, or *vice versa*, shall be appropriately incorporated into the Findings of Fact or Conclusions of Law, as the case may be.

Dated: August 26, 1975.

/s/ LELAND C. NIELSEN
Leland C. Nielsen
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL No. 75-0062-N

ROY W. AIKEN, et al., *Plaintiffs*,

v.

UNITED STATES OF AMERICA, et al., *Defendants*.

Judgment

Defendants' Motion to Dismiss and cross-motions for Summary Judgment having come regularly before this Court for hearing on June 16, 1975, before the Honorable Leland C. Nielsen District Judge, and with plaintiffs appearing through their counsel, Garfield & Tepper, by Scott J. Tepper, and defendants appearing through their counsel, Harry D. Steward, United States Attorney, by Michael E. Quinton, Assistant United States Attorney, and the Court having thoroughly considered the pleadings, exhibits, affidavits and other papers on file herein, and the issues having been duly heard, and a subsequent hearing have been entertained on August 11, 1975, and a decision having been duly rendered, and based upon the Findings of Fact and Conclusions of Law filed herein.

IT IS ORDERED as follows:

1. That each plaintiff listed on Schedule 1 attached hereto shall be entitled to the damages set forth after his or her name and which damages are due and payable forthwith;

2. That each plaintiff listed on Schedule 2 attached hereto shall be entitled to damages payable in two equal annual installments (except in the cases of plaintiffs Phillip L. Roussos, Richard G. Steele and Roxanne E. Geoppo, in which cases they shall be entitled to be paid damages in three equal annual installments) which dam-

ages shall be payable commencing on the date set forth after each plaintiff's name in column 3 of Schedule 2, and which damages shall be the product of the numbers set forth at column 2 of Schedule 2, multiplied by each plaintiff's monthly basic pay as of the date set forth at column 3 thereof;

3. That plaintiffs' request for habeas corpus relief is denied;

4. That plaintiffs shall be entitled to their costs as proven upon their presentation of a bill of costs, which costs shall be made payable to their attorneys of record, Garfield & Tepper, and Hitt & Hartwell, in the amount of $———.

SO ORDERED.

Dated: August 26, 1975.

/s/ LELAND C. NIELSON
Leland C. Nielsen
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL No. 75-0062-N

ROY W. AIKIN, et al., *Plaintiffs,*

v.

UNITED STATES OF AMERICA, et al., *Defendants.*

Order Amending Judgment

IT IS HEREBY ORDERED that the Judgment of the Court in the above-captioned matter, entered on August 28, 1975, be amended as follows, in that page two of that Judgment shall be stricken and the attached page inserted in its place.

This Order is made pursuant to the dictates of Federal Rule of Civil Procedure 54(b).

SO ORDERED.

Dated: October 1, 1975.

/s/ LELAND C. NIELSON
Leland C. Nielsen
United States District Judge

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or her name and which damages are due and payable forthwith;

2. That each plaintiff listed on Schedule 2 attached hereto shall be entitled to damages payable in two equal annual installments (except in the cases of plaintiffs Phillip L. Roussos, Richard G. Steele and Roxanne E. Geoppo, in which cases they shall be entitled to be paid damages in three equal annual installments), which damages shall be payable commencing on the date set forth after each plaintiff's name in column 3 of Schedule 2, and which damages shall be the product of the numbers set forth at column 2 of Schedule 2, multiplied by each plaintiff's basic pay as of the date set forth at column 3 thereof;

3. That plaintiffs' request for habeas corpus relief is denied;

4. That plaintiffs shall be entitled to their costs as proven upon their presentation of a bill of costs, which costs shall be made payable to their attorneys of record, Garfield & Tepper, and Hitt & Hartwell, in the amount of $———;

5. That the Court expressly determines that there is no just reason for delay in the entry of this Judgment, and that it is expressly directed to be entered nunc pro tunc as of the initial entry of Judgment in this case.

SO ORDERED.

Dated: October 1, 1975.

/s/ LELAND C. NIELSON
Leland C. Nielsen
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL No. H-75-110

JOHN R. CAOLA, et al

v.

UNITED STATES OF AMERICA, et al

Memorandum of Decision

These actions by 159 plaintiffs, all enlisted men in the United States Navy, have been consolidated. The plaintiffs seek habeas corpus relief or, in the alternative, money damages under the Tucker Act, 28 U.S.C. § 1346(a)(2), for the alleged breach of military enlistment contracts entered into by each of them. The defendants are the United States, the Secretary of Defense,[1] the Secretary of the Navy, and Vice Admiral Watkins, U. S. Navy, the Chief of Navy Personnel.

Each of the plaintiffs, between 1970 and 1973, enlisted for a period of four years of active duty in the United States Navy by signing a similarly worded enlistment contract. Either concurrently with the signing of their respective enlistment contracts, or shortly thereafter,[2] each plaintiff signed a U.S. Navy form entitled: "AGREEMENT TO EXTEND ENLISTMENT, NAVPERS, 601-1A/NAVCOMPT 513 (Rev. 6-63)," obligating himself for an over-all period of six years of active naval service. The relevant language of the "AGREEMENT TO EXTEND ENLISTMENT" is set forth in

[1] James Schlesinger has resigned as Secretary of Defense. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, his succesor, Donald Rumsfeld, is automatically substituted as a defendant.

[2] While in recruit training, or at a Class A U. S. Navy service school.

the margin.[3] In return for extending their enlistment, these plaintiffs were to receive training in a designated military specialty 1304.10 W B, a "critical skill," and to obtain accelerated advancement and promotion. At the time each plaintiff agreed to extend his enlistment for an additional 24 months, there was in effect a federal statute (37 U.S.C. § 308 [1965]), permitting payment of a Regular Reenlistment Bonus and also a Variable Reenlistment Bonus (V. R.B.) to those members of the armed services who reenlisted for an additional two years. The V.R.B. was designed to assist in obtaining and maintaining an adequate career-manning level in designated specialties,[4] and could be paid

[3] The agreement reads:

"I • • •, in consideration of the pay, allowances, and benefits which will accrue to me during the continuances of my service, voluntarily agree to extend my enlistment as authorized by Section 509, of Title 10, United States Code, and the regulations issued pursuant thereto. I voluntarily agree to extend my enlistment for a period of 24 months from the date of expiration thereof, subject to the provisions and obligations of my said contract of enlistment of which this, my voluntary agreement, shall form a part. 'REASON FOR EXTENSION: Training (Nuclear Field Program or Advanced Electronics (AEF) (Field Program). AUTH: BUPERSMAN 1050300. I understand that this extension becomes binding upon execution and thereafter may not be canceled except as set forth in BUPERSMAN 1050150." [*sic*]

[4] Dept. of Defense Directive 1304.10 Aug. . 15, 1968. Navy policy was set forth in BUPERS (Bureau of Personnel) Instruction 1133.18E, March 23, 1972.

"5. Policy. The general concept and intent of the VRB is to provide a flexible, additional pay incentive to alleviate significant shortages of career petty officers in designated ratings and NEC's [Navy Enlisted Classification] by obtaining additional first-term reenlistments.

a. The Variable Reenlistment Bonus, because of its superior effectiveness as a first-term reenlistment incentive, will be used as the principal method of attaining an adequate Career Manning Level in presently undermanned ratings and NECs.

in an amount up to four times the regular reenlistment bonus.[5] None of the enlistment or reenlistment documents contains any reference to a V.R.B.

By 1974 the Secretary of Defense and the several service secretaries had agreed that a reenlistment bonus was no longer needed as an incentive to maintain desired manpower levels, except in "critical skill" categories.[6] They so informed the Armed Services Committees of both Houses. As a result, Congress enacted, and the President signed, Public Law 93-277 (May 10, 1974). The new law eliminated both the regular reenlistment bonus and the V.R.B., theretofore provided for under § 308(a) and (g) respectively, and substituted a new Selective Reenlistment Bonus (S.R.B.) for the V.R.B. for those with critical skills who would reenlist for an additional four-year term.[7]

The major source of additional career personnel is the additional first-term reenlistments that can be obtained by the award of extra pay in the form of VRB.

b. It is the intent of the Chief of Naval Personnel that, in utilizing the Variable Reenlistment Bonus as a first-term reenlistment incentive, continued and increasing attention be given to quality performance in those who are reenlisted. Strict adherence to the Reenlistment Eligibility Criteria in reference (d) is required if the professional quality of the career force is to be improved."

[5] Amounts of the V.R.B. varied according to the particular skills involved, based upon what men with those skills could be expected to earn in private industry. The Navy Department classified the skills and assigned bonus amounts to each classification according to the shortages of career manpower. *See* BUPERS 1133.18E.

[6] *See* 2 U.S. Code Cong. & Admin. News 1974, at 2985-86.

[7] "Objective. The Selective Reenlistment Bonus is a retention incentive paid to enlisted members serving in certain selected ratings who reenlist or extend their enlistments for a period of at least three years. The objective of the bonus is to increase the number of reenlistments in those ratings characterized by retention levels insufficient to adequately man the career force. Because of its suprior effectiveness as a retention incentive, the Selective Reenlistment Bonus will be used as the principal monetary incentive for attaining adequate Navy career manning."

Exh. K, BUPERS memo from SECNAV to ALNAV, May 31, 1974.

Each of the plaintiffs has received the promised schooling and obtained accelerated advancement to the rank of petty officer. Each now possesses a designated "critical skill." Yet, none of them have received the bonuses provided for by 27 U.S.C. § 308(g). The defendants argue that because none of the plaintiffs had entered into his extended enlistment period before § 308(a) and (g) were superseded by P.L. 93-277, the Navy is under no legal obligation to pay the bonuses. The plaintiffs, on the other hand, claim that they should either be paid those bonuses or be released from further service now or upon the expiration of their original enlistment period.

There are no disputed issues of material fact, and both parties have moved for summary judgment.

I.

Jurisdiction

This action is brought under the fifth amendment to the Constitution of the United States; 28 U.S.C. § 2241; 28 U.S.C. § 1346(a)(2); 28 U.S.C. §1361; 28 U.S.C. § 2201; and 28 U.S.C. § 2202.

II.

The Contract

The first issue presented in whether the "AGREEMENT TO EXTEND ENLISTMENT" was a contract. While the plaintiffs expressly disclaim that any misrepresentations were made to them, they do contend that the central undertaking of the Navy was to induce them to learn critical military skills,

and to extend their periods of enlistment. The BUPERS, which, as regulations having the force of law, are binding on all Naval personnel, *Rehart* v. *Clark*, 448 F.2d 170, 173 (9th Cir. 1971), fully support that contention. Department of Defense Instruction No. 1304.15 (Sept. 3, 1970) describes the Administration of Variable Reenlistment Bonus and Proficiency Pay Programs.[8]

[8] The portions relevant to this case are found under "V. *Criteria*":

"B. *Individual Eligibility for Receipt of Awards*

1. *Variable Reenlistment Bonus.* An enlisted member is eligible to receive a Variable Reenlistment Bonus if he meets all the following conditions:

a. Is qualified and serving on active duty in a military specialty designated under provisions of paragraph V.A.2. above for award of the Variable Reenlistment Bonus. Members paid a Variable Reenlistment Bonus shall continue to serve in the military specialty which qualified them for the bonus unless the Secretary of a Military Department determines that a waiver of this restriction is necessary in the interest of the Military Service concerned.

b. Has completed at least 21 months of continuous active service other than active duty for training immediately prior to discharge, release from active duty, or extension of enlistment.

c. Is serving in pay grade E-3 or higher.

d. Reenlists in a regular component of the Military Service concerned within three (3) months (or within a lesser period if so prescribed by the Secretary of the Military Department concerned) after the date of his discharge or release from compulsory or voluntary active duty (other than for training), or extends his enlistment so that the reenlistment or enlistment as extended provides a total period of continuous active service of not less than sixty-nine (69) months.

(1) The reenlistment or extension of enlistment must be a first reenlistment or extension for which a reenlistment bonus is payable.

(2) No reenlistment or extension accomplished for

The Navy's contention is that its BUPERS "eligibility" criteria cannot be construed as an express promise, and that the "extension agreement" proferred to the plaintiffs was therefore nothing more than an offer. It argues that this offer could be revoked at any time until the act constituting performance, *i.e.*, commencement of service in the reenlistment period, was completed. However, Professor Corbin and the Restatement of Contracts do not share that view of unilateral contract.[9]

any purpose other than continued active service in the designated military specialty shall qualify a member for receipt of the Variable Reenlistment Bonus.

(3) Continued active service in a designated military specialty shall include normal skill progression as defined in the respective Military Service Classification manuals.

e. Has not more than eight years of total active service at the time or reenlistment or extension of enlistment."

[9] *See Miller* v. *Dictaphone Corp.*, 334 F. Supp. 840, 842 (D. Ore. 1971).

The Restatement, Contracts (2d) § 45 (Tentative Draft No. 1, 1964) adopts the view that the offer becomes irrevocable once the offeree begins to perform. Section 45 reads:

"(1) Where an offer invites an offeree to accept by rendering performance and does not invite a promissory acceptance, an option contract is created when the offeree begins the invited performance or tenders part of it.

(2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer."

Corbin explains that:

"[T]he employer's offered promise becomes irrevocable by him as soon as the employee has rendered any substantial service in the process of accepting, and this is true in spite of the fact that the employee may be privileged to quit service at any time." 1A Corbin, *Contracts* § 153, at 19-20 (1963).

At least those plaintiffs who have already entered into their

But it is not necessary to decide this case on a unilateral contract theory. Here there is more than a mere beginning of performance by the offeree. At the time of its offer, the Navy asked each plaintiff for a promise to extend the period of enlistment for an additional 24 months. The plaintiffs gave it. Thus, a bilateral contract was made when the agreements to extend enlistments were signed. This view of these agreements is supported by the Navy's refusal to permit the plaintiffs to cancel them.[10] Other cases, indistinguishable from this one, have also found that a bilateral contract was made, between the Navy and each plaintiff, when the "AGREEMENT TO EXTEND ENLISTMENT" was signed.[11] Since I regard those cases as sound precedent, I follow them.

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extended enlistment period would certainly appear to have "begun performance" and "rendered service" so as to benefit from the above-quoted principles. *See also Sylvestre* v. *State,* 298 Minn. 142, 214 N.W. 2d 658, 667 (1973).

[10] The problem presented by these cases was foreseen, as is clearly indicated by the legislative history of P.L. 93-277. It is there recorded that:

> "[t]here was brought to the attention of the conferees a problem that would exist, particularly in the Navy nuclear-power field, under the House interpretation of the language of the bill. In cases where *commitment*[•] *has been made to a man with a four-year enlistment and a two-year extension* that he can cancel the two-year extension and reenlist for four years and receive a reenlistment bonus for the four-year reenlistment. [sic] The Navy expressed great concern that the language of the bill might be interpreted to require it to abrogate *an understanding it had with enlistees and would* operate in such a way to cause serious retention problems in its most critical career field."

See 2 U.S. Code Cong. & Admin. News 1974, at 3000 (emphasis added).

• "Commitment" is another term for a binding contract. *See, e.g., Ivor B. Clark Co. of Texas, Inc.* v. *Southern B. & I.D. Co.,* 399 F. Supp. 824 (S.D. Miss. 1974)

[11] *See Adams* v. *United States,* —— F. Supp. ——, Civ. No. CV74-1585-ALS (C.D. Cal. Sept. 16, 1975); *Aikin* v. *United States,* —— F. Supp. ——, Civ. No. 75-0062-N. (S.D. Cal. Aug. 26, 1975); *Collins* v. *Schlesinger,* —— F. Supp. ——, Civ. No. 75-0053 (D. Ha. May 29, 1975); *Carini* v. *United States,* —— F. Supp. ——, Civ. No. 74-88-NN (E.D. Va. Jan. 17, 1975), *appeal docketed,* Nos. 75-1399, 75-1400, 4th Cir. April 22, 1975. *See also Larinoff* v. *United States,* 365 F. Supp. 140, 145 (D.D.C. 1973).

Where, as here, a contract is made between an individual and the government, the law in effect at the time the agreement is entered into becomes part of the contract. *Federal Crop. Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384-85 (1947). Accordingly, as held in *Collins,* " . . . although 37 U.S.C. § 308 (1968) was not specifically referred to in the extension agreement form it was part of that agreement by operation of law." Since § 308, entitled *"Special Pay: reenlistment bonus"* falls within the meaning of "pay" as defined in 37 U.S.C. § 101 (21),[12] the bonuses in § 308 were included as part of the "pay" bargained for in the "AGREEMENT TO EXTEND ENLISTMENT." As noted in *Collins,* the government could have drafted an exclusion for the V.R.B. had it intended that it not be included. Since this had not been done, the court held that the contract should be construed against the party which drafted it, in this case the government. I agree, and hold that the Navy is contractually bound to pay the V.R.B. to each plaintiff.

III.

Power of Congress

The government contends that even if the Navy became contractually obligated to pay the V.R.B. to the plaintiffs, that obligation cannot be enforced. Their claim is that Congress was exercising its plenary power to set and alter

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[12] Section 101(21) sets out the following definition: " 'pay' includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not includes allowances. . . ." The V.R.B. was a form of incentive pay. *See* note 4, *supra.*

military pay when it enacted P.L. 93-277. This occurred after the plaintiffs executed their "AGREEMENTS TO EXTEND ENLISTMENT," but before their extended periods began to run. Under that act the V.R.B. was superseded by a new reenlistment incentive, the Selective Reenlistment Bonus.[13]

Although Congress can change the law governing any sort of contract, it can do so only to protect the welfare of its citizens. *Cf. Home Bldg. & L. Ass'n* v. *Blaisdell,* 290 U.S. 398 (1934).

> "The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end . . . .
>
> " . . . This principle precludes a construction that would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." [14]

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[13] The new law contains a "saved pay feature," preserving the expected $2,000 reenlistment entitlement for those on active duty. P.L. 93-277, Sec. 3. 1 U.S. Code Cong. & Admin. News 1974, at 133. *See also* 2 U.S. Code Cong. & Admin. News 1974, at 2987. Congress' specific decision to preserve the regular reenlistment bonus for those then on active duty emphasizes its intention to terminate payments of the V.R.B. This decision forces me to confront the constitutionality of Congress' action.

[14] 290 U.S. at 438-39. This case involved the federal constitutional prohibition against a state's passing a law impairing the obligation of contracts. Article I, section 10. Although the federal government is not restricted by the express language of that clause, its liimtations on governmental powers have been read into the fifth amendment's prohibition against takings of property without just compensation.

> "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. . . . The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

Sinking Fund Cases, 99 U.S. 700, 718-19 (1878).

And it is well established that "[t]o abrogate contracts, in in the attempt to lessen government expenditures, would be not the practice of economy, but an act of repudiation." *Lynch* v. *United States,* 292 U.S. 571, 580 (1934).

The legislative history of P.L. 93-277 makes it unmistakably clear that the major reason for changing from the V.R.B. to the S.R.B. was to save some money by restricting the bonus program in effect under § 308(g). *See* 2 U.S. Code Cong. & Admin. News 1974, at 2984-3000. There is not the slightest indication that the new law had any relationship to the health or welfare of either the men in the service or the public at large. Therefore it is not necessary to investigate the extent of Congress' power to abrogate contracts under its War Powers. I am in agreement with the rulings on this point in *Carini* and *Collins.*[15] Congress did not have the power to abrogate or alter the existing contracts between the plaintiffs and the Navy merely for the purpose of cutting government expenditures. It is clear that in revoking the V.R.B. Congress was acting only to achieve economy, and not in consideration of its War Powers. Thus, the contracts are enforceable.

The plaintiffs' motion for summary judgment is granted. The defendants' motion for summary judgment is denied.

Relief

A. *Habeas Corpus*

The claim for habeas relief was not only inappropriate at the outset,[16] but having been presented only as an alter-

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[15] Cited at note 11 *supra.*

[16] *Carini,* cited at note 11 *supra. Cf. Bell* v. *United States,* 366 U.S. 393 (1961).

native to relief by way of monetary damages, is now moot. The petitions for writs of habeas corpus are denied.

B. *Money Damages*

One hundred thirty-two of the plaintiffs have completed their original four-year enlistments and have commenced service under their reenlistments. Each one is now entitled to receive the V.R.B. which is applicable to him.

C. *Declaratory Relief*

Twenty-seven plaintiffs are still serving their four-year enlistments and have not yet begun to serve in the reenlistment period. They will be entitled to a V.R.B. as soon as they begin to serve the extended period of enlistment, and appropriate declaratory relief shall be entered.

D. *Interest*

The prayer for relief requests that any award to each plaintiff include interest at the rate of seven per cent from the date on which the complaint was filed, or on which each plaintiff's entitlement to the V.R.B. occurred. However, interest may be awarded against the United States only as is provided by statute. The Tucker Act, 28 U.S.C. § 2411(b), provides that "on all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest shall be computed at the rate of 4 percentum per annum from the date of the judgment . . . ." Interest is awarded to each plaintiff in accord with section 2411.

E. *Mandamus*

For all of the plaintiffs the multiple to be used in computing their V.R.B. shall be the last effective V.R.B. multiple assigned to their respective designated career specialties prior to June 1, 1974. *See* BUPERS 1304.10. The computations which must be made in each case may

require some administrative competence, but they do not call for the exercise of judgment or discretion. Since in this case the duty to pay is imposed by law, as determined above, a court may order such payments to be made notwithstanding the prior contrary decision of the Secretary of the Navy. *See Miguel* v. *McCarl*, 291 U.S. 442 (1934).

Accordingly, an injunction will issue requiring the Secretary of the Navy to rescind any instructions which have the effect of denying the V.R.B. to any of the plaintiffs in this case. The injunction will also require the Secretary to compute the V.R.B.'s to which each plaintiff is entitled, in the manner set forth under the heading *Relief* in this opinion. All V.R.B.'s as so determined, with interest thereon at the rate of four per cent per annum, shall be paid by draft or other negotiable instrument of the United States of America made payable to each plaintiff and his attorney of record in this case.

This injunction may be modified by this court for good cause shown by any party to this suit.

The plaintiffs are entitled to receive their costs.

So Ordered.

Dated at Hartford, Connecticut, this 4th day of December, 1975.

/s/ M. Joseph Blumenfeld
M. Joseph Blumenfeld
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL No. H-75-110

JOHN R. CAOLA, ET AL.

v.

UNITED STATES OF AMERICA, ET AL.

Ruling on Motions to Reconsider and to Amend the Memorandum of Decision

Since the court's memorandum of decision was filed on December 4, 1975, both parties have filed motions asking the court to reconsider it.

1. On January 6, 1976, the plaintiffs moved to amend it so as to hold that each plaintiff was entitled to a V.R.B. computed on the basis of the V.R.B. multiple assigned to his designated career specialty (rating or NEC) as of the time he executed his Agreement to Extend Enlistment, instead of the V.R.B. multiple assigned to his career specialty last effective prior to June 1, 1974.

2. On January 26, 1976, the defendants moved the court to reconsider its December 4, 1975 Memorandum of Decision and on reconsideration grant the defendants' motion for summary judgment.

These motions will be considered in inverse order.

I.

The defendants' motion to reconsider the decision is granted; upon reconsideration I adhere to my ruling. The grounds of the defendants' motion are not different in any way from those originally relied upon. The only matter now brought to the attention of the court which was not considered before is the subsequent opinion of the United

States Court of Appeals for the Fourth Circuit, *Carini* v. *United States*, 528 F.2d 739 (4th Cir. 1975), which reversed *Carini* v. *United States*, Civil No. 74-88-NN (E.D. Va. Jan. 17, 1975). Although I considered the *Carini* case indistinguishable from the one before me, the Court of Appeals opinion does not persuade me that the reliance I put upon Judge Kellam's opinion was misplaced. Indeed, a more recent case decided by the United States Court of Appeals for the District of Columbia, *Larionoff* v. *United States*, No. 74-1211 (decided Feb. 17, 1976) (opinion by McGowan, C.J.), expressly and squarely disagrees with the Fourth Circuit, see n.35 at 27. Having reconsidered the defendants' motion for summary judgment, I adhere to my earlier decision which denied it.

II.

Turning next to the plaintiffs' motion to amend the memorandum of decision, I am again confronted with *Larionoff* v. *United States, supra* (D.C. Cir. 1976).

The amendment which the plaintiffs seek goes only to the matter of relief, and specifically to the manner of calculating the bonuses which the plaintiffs became entitled to receive when they executed their Agreements to Extend their Enlistments. I am now convinced that although the Navy's regulations permitted it to reduce or even terminate awards in carrying out its enlistment policies, the regulations should not be construed to have any effect upon a serviceman's eligibility to receive an award, once that eligibility is attained. A thorough and perceptive analysis of the pertinent regulations has been made by Judge McGowan in *Larionoff*, Part II B, at 15-23, to support the conclusion reached in that case:

> "Since the regulations at issue recognize that eligibility can be attained prior to actual entry into the period of extended service, and since the Government's interpretation of the regulations, unlike that of the

plaintiffs, is at odds with congressional intent, we construe the contracts to mean that appellants are entitled to the VRB award level in effect when they signed their extension agreements." (Footnotes omitted).

Since I am in complete agreement with that analysis and the conclusions reached there is no reason to re-till the same ground so thoroughly worked by Judge McGowan.[1]

Accordingly, I conclude that the date on which each plaintiff executed his extension agreement is the proper date to use in computing the V.R.B. multiplier. The plaintiffs' motion to amend the memorandum of decision is granted.

ORDERED, that the portion of this court's Memorandum of Decision dated December 4, 1975, consisting of the first sentence of paragraph E. *Mandamus*, under *Relief*, is amended to read as follows:

"For all of the plaintiffs the multiple to be used in computing their V.R.B. shall be the multiple assigned to their respective designated career specialties (rating or NEC) at the time each plaintiff executed his AGREEMENT TO EXTEND ENLISTMENT."

SO ORDERED.

Dated at Hartford, Connecticut, this 13th day of April, 1976.

/s/ M. JOSEPH BLUMENFELD
M. Joseph Blumenfeld
United States District Judge

[1] I draw further support for this conclusion from Judge Pence's similar amendment to his original decision in *Collins* v. *Schlesinger*, Civil No. 75-0053 (D. Hawaii Dec. 9, 1975).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1211

NICHOLAS J. LARIONOFF, JR., ET AL.

v.

THE UNITED STATES OF AMERICA, ET AL., *Appellants*

No. 74-1212

NICHOLAS J. LARIONOFF, JR., ET AL., *Appellants*

v.

THE UNITED STATES OF AMERICA, ET AL.

Appeals from the United States District Court for the District of Columbia

(D.C. Civil 626-73)

Argued March 3, 1975

Decided February 17, 1976

Stephen Daniel Keeffe for appellants in No. 74-1212 and appellees in No. 74-1211.

Neil H. Koslowe, Attorney, Department of Justice, with whom *Carla A. Hills*, Assistant Attorney General at the time the brief was filed, *Earl J. Silbert*, United States Attorney, and Robert E. Kopp, Attorney, Department of Justice, were on the brief, for appellants in No. 74-1211 and appellees in No. 74-1212. *Morton Hollander*, Attorney, Department of Justice and *Michael A. Katz*, Assistant United States Attorney, also entered appearances for appellants in No. 74-1211 and appellees in No. 741212.

Before: RICHARD T. RIVES,* *Senior Circuit Judge for the Fifth Circuit*, WRIGHT and MCGOWAN, *Circuit Judges.*

McGOWAN, *Circuit Judge*: Congress has been continuously concerned from its inception with the problem of maintaining an adequately manned military establishment for the protection of our national interests. Although one controversial response to that problem has been the operation of a system of compulsory military service. Congress has also—especially in recent years—attempted to provide a sufficient monetary incentive to attract men and women to careers in the military. One approach that has frequently been chosen by Congress is the award of a monetary bonus —recently labeled a "Regular Reenlistment Bonus"—to enlisted personnel who reenlist or extend the period of their obligated service.[1] Since 1965, Congress has also provided an additional reenlistment bonus—a "Variable Reenlistment Bonus"—to enlisted personnel whose skills are in critically short supply.[2] That Variable Reenlistment Bonus (VRB), which is available to enlisted personnel eligible for a Regular Reenlistment Bonus (RRB), is set by regulation at a multiple of the RRB.[3]

The seven named plaintiffs who filed this class suit in the District Court are enlisted personnel in the United States Navy who claim that they are entitled by contract or under the doctrine of promissory estoppel to receive VRBs equal to four times the amount of their respective RRBs. We conclude that the District Court properly asserted juris-

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* Sitting by designation pursuant to Title 18, U.S. Code Section 294(d).

[1] *See* text and note at note 16, *infra.*

[2] *See* text and notes at notes 18-22 *infra.*

[3] For an analysis of the effectiveness of VRB awards in eliminating career manning shortages in critically needed skills, see Comptroller General, Military Retention Incentives: Effectiveness and Administration (B-160096) (1974).

diction pursuant to 28 U.S.C. § 1346(a)(2),[4] and, for the reasons set forth below, we affirm the judgment of the District Court ordering payment of VRBs to the named plaintiffs. We affirm the District Court's order certifying the suit as a class action under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure and awarding attorneys' fees of $14,729. And finally, we remand the case to the District Court for further proceedings concerning an award of attorneys' fees for the efforts of counsel directed to this appeal.

I. FACTUAL BACKGROUND

On June 23, 1969 plaintiff Larionoff enlisted in the United States Navy for four years. Shortly thereafter, he underwent a series of tests and interviews to determine his appropriate duty assignment. During the course of those interviews with Navy personnel, Larionoff decided to participate in the Advanced Electronic Field (AEF) training program, successful completion of which would place him in the Communications Technician-Maintenance (CTM) service rating. At the time he decided to enter the AEF program, Larionoff was aware that the CTM rating was classified as a "critical military skill" qualifying for a Variable Reenlistment Bonus equal to four times the amount of an enlisted member's Regular Reenlistment Bonus.[6]

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[4] Section 1346(a)(2) of Title 28 provides in relevant part:

> The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> . . . Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort.

[5] The Distict Court opinion is reported at 365 F. Supp. 140 (D.D.C. 1973).

[6] Affidavit of Nicholas J. Larinoff, App. at 17.

Under applicable Navy regulations, the AEF program involved in a six year service obligation, and plaintiff Larionoff consequently executed the following "Agreement to Extend Enlistment":

> I NICHOLAS JOHN LARIONOFF JR., B 17 77 88, SNJEF, USN having enlisted in the Navy of the United States on 23 JUN 69 for FOUR years, *in consideration of the pay, allowances, and benefits which will accrue to me during the continuances of my service,* voluntarily agree to extend my enlistment as authorized by Section 5339, of Title 10, United States Code, and the regulations issued pursuant thereto. I voluntarily agree to extend my enlistment for a period of TWO years from the date of expiration thereof, subject to the provisions and obligations of my said contract of enlistment of which this, my voluntary agreement, shall form a part. REASON FOR EXTENSION: "Training (Advanced Electronics Field (AEF) Program—BuPers 1tr Pers-B2131-gn-56 of 31 August 1966). I understand this extension agreement becomes binding upon execution and thereafter may not be cancelled except as set forth in BUPERS Manual. Article C-1407."

App. at 134 (emphasis added). On that same day, plaintiff Larionoff executed a document requesting assignment to the AEF program and acknowledging his six year obligation:

> I fully understand that, by virtue of having been enlisted in the U.S. Navy as a SNJC 1 am guaranteed assignment to either one of a group of service schools or to [*sic*] duty in a specific apprenticeship field upon successful completion of recruit training. I desire to waive my rights guaranteed by my enlistment contract, and I hereby request that my rate be changed in equal pay grade to SNJEF. This change of rate is requested for the purpose of: Assignment to the advanced electronics field program. The provisions of this program, the category to which my rate will be changed and the six (06) years service obligation have been fully explained to me.

App. at 135.

On March 9, 1970 Larionoff successfully completed the AEF training program and was advanced to the CTM rating and the E-4 pay grade. He executed a document on that date attesting to his advancement to the E-4 pay grade.[7]

Up to this point in time, neither the Navy nor plaintiff Larionoff had reason to complain about the events that had transpired. The complicating factor, however, was that Larionoff still *expected to receive* a Variable Reenlistment Bonus once he entered into his period of extended service on June 23, 1973. The Navy cast some doubt on that expectation when it announced on March 24, 1972 that effective July 1, 1972 the CTM rating would no longer be designated as a "critical military skill" eligible for the VRB award. After realizing that the Navy considered him ineligible for a Variable Reenlistment Bonus, Larionoff had his elected representatives in Congress communicate with the Bureau of Naval Personnel concerning his

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[7] I understand and agree that upon my being advanced to pay grade E-4 in accordance with BUPERSINST 1430.14 series, that page 1A ["Agreement to Extend Enlistment"] date 09 JUL 69, which was executed for the purpose of AEF Program, will become binding and will serve to fulfill the obligated service requirements for automatic advancement. I understand that any future cancellation of obligated service requirements for the purpose of AEF Program will not serve as reason for cancellation of page 1A dated 09 JUL 69 except as set forth in BUPERSMAN 1050300.

App. at 130.

eligibility for the VRB.[8] These efforts were unsuccessful; the Bureau asserted that the CTM service rating had been removed from the list of eligible service ratings, thus precluding payment of a VRB to plaintiff Larionoff.[9]

The other six named plaintiffs [10] have undergone similar administrative processing by the Navy. They all signed extension agreements [11] subsequent to April 20, 1966 (the date the CTM rating was designated as a "critical military skill") extending their enlistments for two years for the purpose of receiving AEF training; executed documents requesting assignment to AEF training and acknowledging their six year obligations; received their training, were advanced to the CTM rating and the E-4 pay grade prior to July 1, 1972; executed documents attesting to their advancement to the E-4 pay grade; entered the extension periods of their enlistments subsequent to July 1, 1972 (the date that the "critical military skill" designation for the CTM rating was terminated); and received their Regular Reenlistment Bonuses.[12]

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[8] Larionoff apparently also asked his elected representatives to pursue the question of recission of the extension agreement. *See* App. at 152, 163.

[9] The Bureau also stated that the extension agreement was "legal and binding and may not be abrogated based on [Larionoff's] ineligibility for VRB." App. at 161; *see* note 8 *supra*.

[10] Thomas W. Dietz, Joseph R. Tomaino, Lawrence E. White, Paul E. Boudreau, Johnnie S. Johnson, John Clay Smith.

[11] The affidavits in the record of Dietz, Tomaino, White, and Boudreau indicate that the VRB program was explained to them prior to the execution of their extension agreements, but that no one explained to them that the applicable VRB award level could subsequently be changed. *See* App. at 13, 15, 19, 20.

[12] At the time briefs were filed in this case, plaintiff Johnson had not yet entered the extension period of his enlistment and consequently was not eligible at that time *to receive* his Regular Reenlistment Bonus.

As to the other six named plaintiffs, it was stipulated by the parties that they could receive their Regular Reenlistment Bonuses without prejudice to their claims for VRBs. App. at 248.

On March 30, 1973, the named plaintiffs filed this class action [13] in the District Court seeking either payment of the VRB award level in effect when the extension agreements were signed or rescission of their extension agreements.[14] On September 28, 1973, the District Court certified the action as a class action pursuant to Rule 23(b)(1)(B); granted plaintiffs' motion for summary judgment and ordered payment of VRBs; and awarded plaintiffs' counsel attorneys' fees of $14,729.00 to be obtained from the class recovery. The Government appeals, claiming error with respect to both the grant of the motion for summary judgment and the class certification. The plain-

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[13] The initial complaint described the class as follows: "All persons in the U.S. Navy who reenlisted for two years additional duty prior to July 1, 1972, in a critical skill training program pursuant to § 308(g) Title 37 U.S. Code, that had a bonus multiple of four prior to the above date and which was subsequently eliminated upon that date." App. at 8. The amended complaint, filed on August 20, 1973, contained a similar, but not identical, description of the class: "All persons in the U.S. Navy who enlisted for an additional period prior to July 1, 1972 in a critical skill training program pursuant to § 308(g), Title 37 U.S. Code, that as a communications technician had a variable bonus multiple of four prior to the above date and which was subsequently eliminated upon that date." App. at 208-09.

[14] Actually, the initial complaint filed on March 30, 1973 sought only a declaratory judgment, an order setting "the case down for prompt hearing to fashion to relief required for each plaintiff," and such other relief "as is necessary and proper." App. at 11. The District Court granted plaintiffs' counsel leave to amend the complaint to avoid dismissal for lack of subject matter jurisdiction, 365 F. Supp. at 146, and it was in the amended complaint that plaintiffs specifically requested either award of VRBs or rescission. App. at 211. In the event the District Court awarded rescission, plaintiffs asked that defendants be ordered to grant each of the plaintiffs an Honorable Discharge pursuant to 10 U.S.C. § 6291. App. at 211.

tiffs cross-appeal with respect to the failure of the District Court (1) to order rescission, (2) to order disclosure by the government of the names of members of the class, and (3) to compensate adequately plaintiffs' attorneys.

II. Entitlement to the Variable Reenlistment Bonus

Plaintiffs offer two theories to support their contention that they are entitled to receive VRBs. They first argue that they executed their extension agreements "in consideration of the pay, allowances, and benefits" which were to accrue during the period of extended service, *see* slip opinion pages 4-5 *supra*, and that the term "pay" includes awards of VRB. As an alternative ground, plaintiffs maintain that they are entitled to receive VRBs on a theory of promissory estoppel in that they relied to their detriment on oral representations concerning VRB eligibility made by naval personnel attempting to get them to execute extension agreements. We find it unnecessary to reach the issue of promissory estoppel since we find that under applicable military regulations plaintiffs are entitled to VRBs as part of the "consideration" for which they executed extension agreements.[15] Since our interpretation of the relevant regulations depends in part on the legislative history of the statutory provisions delegating to the Secretary of Defense the authority to prescribe eligibility criteria, we turn first to an analysis of the basic statutory provisions establishing the VRB award.

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[15] The Supreme Court has emphasized that "'[a] soldier's entitlement to pay is dependent upon statutory right.'" Bell v. United States, 366 U.S. 393, 401 (1961). All parties to this case recognize that since the applicable statute provides that payment of VRB awards is to be determined according to "regulations prescribed by the Secretary of Defense," the outcome under the plaintiffs' contract theory depends primarily on our interpretation of the applicable regulations.

A. Statutory Provisions

As early as 1795, Congress provided by statute for the payment of a "reenlistment bonus" to members of the armed services who reenlisted within a short period following their separation from the service, and eligibility for that bonus was eventually extended to those who agreed to extend the length of their service obligation prior to the expiration of the period for which they had agreed to serve.[16] The method of computing the amount

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[16] Early statutes providing a monetary bonus upon reenlistment include: Act of Jan. 2, 1795, ch. 9, § 5, 1 Stat. 408 (reenlistment bounty for certain members of the army); Act of Mar. 3, 1795, ch. 44, § 6, 1 Stat. 430 (same); Act of May 30, 1796, ch. 39, § 7, 1 Stat. 484 (same); Act of Jan. 27, 1814, ch. 7, § 4, 3 Stat. 95 (same); Act of July 5, 1838, ch. 162, § 29, 5 Stat. 260, *as amended*, Act. of Aug. 3, 1861, ch. 42, § 9, 12 Stat. 288 (same); Act of Aug. 4, 1854, ch. 247, § 2, 10 Stat. 575, *as amended*, Act of Mar. 3, 1875, ch. 131, § 10, 18 Stat. 419, *as amended*, Act of Aug. 1, 1894, ch. 179, § 3, 28 Stat. 216, *as amended*, Act of May 11, 1908, ch. 163, 35 Stat 110, *as amended*, Act of June 4, 1920, ch. 227, § 27, 41 Stat. 775 (same); Act of Mar. 3, 1863, ch. 75, § 18, 12 Stat. 734 (same); Act of Aug. 24, 1912, ch. 391, § 2, 37 Stat. 590 (same); Act of June 3, 1916, ch. 134, § 34, 39 Stat. 188, *as amended*, Act of June 4, 1920, ch. 227, § 31, 41 Stat. 775 (same); Act of Mar. 3, 1845, ch. 77, § 9, 5 Stat. 795 (additional pay for certain reenlistments in the Marine Corps.); Act of Aug. 5, 1854, ch. 268, 10 Stat. 586 (same); Act of Mar. 2, 1837, ch. 21, § 3, 5 Stat. 153 (additional pay for certain reenlistments in the naval service); Act of Mar. 2, 1855, ch. 136, § 2, 10 Stat. 627, *as amended*, Act of June 7, 1864, ch. 111, 13 Stat. 120, *as amended*, Joint Resolution No. 62, 29 Stat. 476 (1896), *as amended*, Act of Mar. 3, 1899, ch. 413, §16, 30 Stat. 1008, *as amended*, Act of Aug. 22, 1912, ch. 335, 37 Stat. 331, *as amended*, Act of July 12, 1921, ch. 44, § 2, 42 Stat. 139.

In 1922, Congress enacted a single and more systematic piece of legislation authorizing reenlistment bonuses to enlisted members of the army, navy, and marine corps. Act of June 10, 1922, ch. 212, §§ 9-10, 42 Stat. 629-30, *as amended*, Act of June 16, 1942, ch. 413, §§ 10, 19, 56 Stat. 364, 369, *as amended*, Act of Sept. 7, 1944, ch. 407, § 8, 58 Stat. 730, *as amended*, Act of June 28, 1947, ch. 163, § 4, 61 Stat. 192. *See also* Act of Aug. 18, 1941, ch. 364, § 2, 55 Stat. 629, *as amended*, Act of June 16, 1942, ch. 413, § 10, 56

of the bonus has varied, but by 1954 Congress settled on the following formula: the monthly basic pay of the serviceman at the time of discharge or release *times* the number of years specified in the reenlistment contract. *See* Act of July 16, 1954, Pub. L. No. 506, § 2, 68 Stat. 488.[17]

Stat. 364, *as amended,* Act of Oct. 12, 1949, ch. 681, § 531(b)(29), 63 Stat. 838. This coordinated approach to reenlistment bonuses was again overhauled in 1949. Career Compensation Act of 1949, ch. 681, § 207, 63 Stat. 811, *as amended,* Act of July 16, 1954, Pub. L. No. 506, 68 Stat. 488, *as amended,* Act of July 25, 1961, Pub. L. No. 87-103, 75 Stat. 219. These provisions were enacted into positive law in 1962 and *codified as* 37 U.S.C. § 308, *see* Act of Sept. 7, 1962, Pub. L. No. 87-649, 76 Stat. 467, and were restated without substantive change in 1968, *see* Act of Oct. 22, 1968, Pub. L. No. 90-623, §§ 3(1), 6, 82 Stat. 1314-15.

In 1974, Congress amended the relevant statutory provisions to limit eligibility for the reenlistment bonus to those servicemen who possess skills designated as "critical" by the Secretray of Defense. Armed Forces Enlisted Personnel Bonus Revision Act of 1974, § 2(1), 37 U.S.C. § 308 (Supp. IV, 1974). The 1974 amendments also contained a grandfather clause preserving the options of those servicemen eligible for a reenlistment bonus on the date before the effective date of the 1974 amendments. Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Pub. L. No. 93-277, § 3, 88 Stat. 121.

[17] The formula in text applies only to a serviceman's *first* reenlistment; bonus awards for subsequent reenlistments were calculated according to slightly different formulae producing progressively smaller bonus awards. The *Variable* Reenlistment Bonus awards at issue in this case are a function of the *Regular* Reenlistment Bonus awards for first time reenlistments only. Act of August 21, 1965, Pub. L. No. 89-132, § 3, 79 Stat. 547, *as amended,* Act of Oct. 22, 1968, Pub. L. No. 90-623, §§ 3(1), (5), 82 Stat. 1314-15, *as amended,* 37 U.S.C. § 308 (Supp. IV, 1974).

It is also important to note that Congress has often established a limitation on the total amount that could be paid to an enlisted member in the form of regular reenlistment bonuses. *See, e.g., Career Compensation* Act of 1949, ch. 681, § 207(a), 63 Stat. 811. The Variable Reenlistment Bonus does not count toward this statutory maximum. Act of August 21, 1965, Pub. L. No. 89-131, § 3, 79 Stat. 547, *as amended,* 37 U.S.C. § 308 (Supp. IV, 1974).

The Department of Defense eventually recognized that the statutory formula was inefficient since it failed to vary the monetary incentive for reenlistment according to the needs of the armed services for personnel with particular skills. In other words, if a branch of the armed services was adequately manned except for a critical shortage of communications technicians, that branch would nevertheless be prohibited by statute from offering communications technicians a stronger incentive in the form of a larger reenlistment bonus. Consequently, the President's 1965 legislative proposals to Congress concerning increased pay for servicemen included a recommendation that the Department of Defense be authorized to award an additional flexible reenlistment bonus to enable the Department to provide a strong reenlistment incentive to those personnel whose skills were in short supply.[18]

The Defense Department urged both the House and Senate Armed Services Committees to act favorably on this Variable Reenlistment Bonus incentive provision:

> Additional reenlistments are needed in specialties accounting for about 40 percent of total enlisted force strength in order to achieve all of the services' manning objectives. The problem is much more serious in a smaller portion of our force. *In a few of the*

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[18] The President proposed adding the following provision to section 308 of Title 37 of the United States Code:

> (g) Under regulations to be prescribed by the Secretary of Defense, or the Secretary of the Treasury with respect to the Coast Guard, a member who is designated as having a critical military skill and who is entitled to a bonus computed under subsection (a) upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus. An amount paid under this subsection does not count against the limitation prescribed by section (c) of this section on the total amount that may be paid under this section.

H.R. Doc. No. 170, 89th Cong., 1st Sess. 12 (1965).

most critically undermanned specialties, comprising about 5 percent of our force strength, losses of $10,000 or more occur whenever a first termer fails to reenlist and operational capability suffers because of severe shortages of careerists. In these skills, additional reenlistment incentives are clearly needed.

The most attractive way to provide a strong reenlistment incentive to first termers in a small part of the force is through a variable reenlistment bonus. *A reenlistment bonus concentrates retention money at the reenlistment decision point, thereby getting the most drawing power per retention dollar.* A variable bonus can be tailored to fit particular skill retention requirements and can be changed as those requirements change since there are no express or implied commitments about future payments. The present reenlistment bonus does not discriminate among skills and thereby does not help solve the selective retention problem.

H.R. Rep. No. 549, 89th Cong., 1st Sess. 47-48 (1965) (emphasis added). *See* S. Rep. No. 544, 89th Cong., 1st Sess. 18 (1965); Hearing on H.R. 5725 and H.R. 8714 Before the House Comm. on Armed Services, 89th Cong., 1st Sess., ser. 13, at 2545, (1965); Statement of then Secretary McNamara). Both committees approved the following Variable Reenlistment Bonus award provision:[19]

> Under regulations to be prescribed by the Secretary of Defense, or the Secretary of the Treasury with respect to the Coast Guard when it is not operating as a service in the Navy, a member who is

[19] The House committee modified the language of the proposed VRB provision to provide for payment of the VRB in yearly installments, thus easing the tax impact on the recipient. H.R. Rep. No. 549, 89th Cong., 1st Sess. 48 (1965). Except for that modification, the language approved by the committees is essentially the same as that proposed by the President. *See* note 18 *supra*.

> designated as having a critical military skill and who is entitled to a [Regular Reenlistment] bonus . . . upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus.

In the course of the floor debate over what was to become the Uniformed Services Pay Act of 1965, it became quite clear the Department of Defense had convinced the Congress that the VRB provision was cost-justified since it would save the Government the cost of training a replacement whenever a first term enlisted member decided to reenlist.[20] *See, e.g.*, 111 Cong. Rec. 17206 (1965) ("[T]he career motivation that will be generated among the hard core elements, specifically the highly technically trained people throughout the services, will more than make up in actual dollars saved for the cost of the legislation.") (remarks of Representative Morton); *id.* at 17206 ("It is just plain good personnel planning to provide a $4,000 bonus to encourage reenlistment rather than pay $10,000 to train a replacement.") (remarks of Representative Bennett); *id.* at 17209 (remarks of Representative Dole); *id.* at 20034 (remarks of Senator Russell). And it is also clear that Congress viewed the VRB provision as an effective incentive to be brought to the attention of enlisted personnel at the point in time when they are choosing whether and how long to continue military service.[21] *See, e.g., id.* at 17201 ("The [variable reenlistment] bonus would channel additional pay into these specialties. It offers the incentive toward career service at just the time that it will be most effective, when an individual decides whether or not to reenlist.") (remarks of Representative Nedzi).

[20] *See* Deschler v. United States, 203 Ct. Cl. 477, 483-84 (1974); 47 Comp. Gen. 414, 416 (1968).

[21] *See* Parker v. United States, 198 Ct. Cl. 661, 666, 461 F.2d 806, 809 (1972).

With these objectives in mind, Congress enacted the VRB provision as recommended by the House and Senate committees, delegating to the Secretary of Defense the authority to issue regulations for the administration of the VRB program. Act of August 21, 1965, Pub. L. No. 89-131, § 3, 79 Stat. 547, *as amended,* Act of Oct. 22, 1968, Pub. L. No. 90-623, §§ 3(1), 5, 82 Stat. 1314-15, *as amended,* 37 U.S.C. § 308 (Supp. IV, 1974).

B. Military Regulations [22]

In interpreting the regulations issued by both the Department of Defense and the Department of the Navy with respect to the VRB program, it is important to emphasize the narrow question at issue. The Government takes the position that under applicable military regulations eligibility for a Variable Reenlistm nt Bonus attaches *at the date of actual entry* into the reenlistment or extension period. Brief at 21. The Government does not argue that appellants would not have been entitled to a VRB if the CTM service rating had been designated as a critical military specialty when they entered their periods of extended service.[23] Nor does the Government argue that appellants are not entitled to the Regular Reenlistment Bonus that at least until 1974 was automatically paid upon extension or reenlistment.[24] The Government simply

[22] The regulations discussed in this section of the opinion are recent regulations reprinted in the Appendix filed with the court. We are told in the Government's brief that similar requirements were contained in earlier versions of the regulations. Brief at 21 n. 13; *see* App. at 89.

[23] In its brief, the Government concedes that the term "pay" in the extension agreement includes the VRB. Brief at 16. Thus, if the Navy had *reduced* rather than *terminated* the VRB award level for the CTM rating, the Government would apparently contend that appellants were entitled only to the lower VRB award level.

[24] *See* note 12 *supra.*

maintains that appellants are entitled only to the VRB in effect when they actually entered into the period of extended service, which for each appellant amounts to zero.

At first glance, the applicable military regulations would seem to support the Government's position. The Department of Defense Directive prescribing policies for award of the VRB deals specifically with the question of reduction and termination of VRB awards:

> When a military skill is designated for reduction or termination of award an effective date for reduction or termination of awards shall be established and announced to the field at least 90 days in advance. All awards on or after that effective date in military skills designated for reduction of award level will be at the level effective that date and no new awards will be made on or after the effective date in military skills designated for termination of awards.

DOD Directive 1304.14, ¶ IV.F (Sept. 3, 1970). Of course, that Directive is at best ambiguous, in that it is not clear whether a VRB is "awarded" when an enlisted member signs an agreement to extend enlistment or when he or she actually begins to serve the period of extension. Section IV.D.2 of the Directive, however, tells us that "[s]pecific provisions for individual eligibility of enlisted members for receipt of awards" are contained in a separate Department of Defense Instruction.

That separate regulation also addresses the question of reduction and termination of awards:

> Members serving in a military specialty designated for reduction or termination of award under the provisions of subsection IV.F. of reference (a), will receive the award level effective on the date of their reenlistment or extension of enlistment, *except as provided in paragraph V.B.1.f. above.*

Department of Defense Instruction 1304.15, ¶ VI.A (Sept. 3, 1970) (emphasis added). Were it not for the "except" clause, this regulation would also apparently support the Government's interpretation of the VRB program.[25] The question thus becomes whether "paragraph V.B.1.f." leads to a different result.

The relevant portion of paragraph V.B.1. provides that "[a]n enlisted member is eligible to receive a Variable Reenlistment Bonus if he . . .

> f. Attains eligibility prior to the effective date of termination of awards in any military specialty designated for termination of the award. Member must attain eligibility prior to the effective date of a reduction of award level to be eligible for the higher award level. *Eligibility attained through any modification of an existing service obligation, including any early discharge granted pursuant to 40 U.S.C. 1171, must have been attained prior to the date the authority approving the modification was notified of the prospective termination or reduction of award in the military specialty.*

(Emphasis added.) And the regulations issued by the Department of the Navy indicate that an extension of enlistment qualifies as a form of "modification of an existing service obligation":

> Member must attain eligibility prior to the effective date of a reduction of award level to be eligible for the higher award level. Eligibility attained through an early discharge for the purpose of immediate reenlistment, *or extension of enlistment, or other modification*

[25] Actually, it would be possible to read "extension of enlistment" to mean, at least for the purposes of the quoted paragraph, the date on which the extension agreement is signed. Our interpretation of paragraph V.B.1.f., however, makes it unnecessary to clarify that ambiguity.

> *of an existing service obligation* including any early discharge granted pursuant to article 3840240 of reference (d) (discharge within 3 months of expiration of active obligated service) shall be attained prior to the date the authority approving the modification is notified or the prospective termination or reduction of award in the [service rating]. This is the date a command receives the Bureau of Naval Personnel directive announcing termination or reduction of awards in the [service rating].

BUPER INST 1133.18E, ¶ 7.h (Mar. 23, 1972) (emphasis added).

Paragraph V.B.1.f. of the Defense Instruction and paragraph 7.h of the Navy Instruction were apparently designed to prevent enlisted members from receiving the higher award level of a VRB scheduled for reduction merely by modifying their service obligations *after* learning of the planned reduction but *prior* to its effective date. Thus, if the Navy announced on March 24, 1972 that a VRB with a multiple of four was to be reduced to a multiple of two for the CTM rating effective July 1, 1972, an enlisted member extending his or her service obligation after March 24, 1972[26] and entering on the period of extension prior to July 1, 1972 would nevertheless be entitled only to the lower VRB award level with a multiple of two. Only those enlisted personnel modifying their service obligations prior to March 24, 1972 would have attained eligibility for the higher VRB award level with a multiple of four.

The application of these regulations to appellants leads us to conclude that they are entitled to the VRB award level in effect on the date they signed their respective

[26] Actually, the appropriate date is the date the command receives the Navy directive announcing termination or reduction of awards in relevant service ratings. BUPER INST 1133.18E, ¶ 7.h (Mar. 23, 1972).

agreements to extend enlistment.[27] Those agreements were executed prior to March 24, 1972, the date on which the Navy announced termination effective July 1, 1972 of the VRB award for the CTM rating. If appellants are otherwise entitled to receive a VRB award, as the Government concedes they are, that award is not to be determined according to the award level in effect on the date they actually entered into their respective periods of extension, but rather according to the award level in effect when they executed their extension agreements.

To hold otherwise would undermine the explicit language of paragraphs V.B.1.f. and 7.h. of the appropriate regulations, in that neither those who extended their enlistments *on or after* March 24, 1972 nor those who extended their enlistments *before* March 24, 1972 could attain eligibility for the higher award if they were to begin their extended service on a date after July 1, 1972. The paragraphs referred to above obviously contemplate a situation in which enlisted personnel *attain eligibility* prior to the point at which they enter into periods of extended service.

Moreover, the Government's interpretation would lead to results clearly at odds with the explicit congressional objectives. For example, under the Government's approach an enlisted member who signed an extension agreement when the CRB award level was at a multiple of two but entered into extended service when the multiple was set at four would receive the *higher award level*. Despite the fact that a bonus with a multiple of two was a sufficient reen-

[27] The applicable military regulations prescribe a number of conditions that must be satisfied before an enlisted member can receive his Variable Reenlistment Bonus. Our decision does not eliminate the other conditions established by the military departments. We merely hold that an enlisted member who extended his or her service obligation and who is *otherwise qualified* for a VRB award—as the Government concedes these plaintiffs are—is entitled to the VRB award level in effect on the date the extension contract is signed.

listment incentive for that enlisted member, the Government would apparently award him a windfall in the form of a bonus with a multiple of four.

The Government's interpretation would also frustrate congressional objectives by complicating the decision whether to reenlist. The legislative history indicates that Congress intended to offer enlisted personnel a specific sum [28] in addition to the automatic Regular Reenlistment Bonus as an incentive to reenlist in skill areas in critically short supply. Under the Government's approach, an enlisted member (with a skill designated as critical) considering extension of service would have to weigh not only the current VRB award level, but the VRB award level in effect on the date on which he or she would actually begin serving the period of extension. The latter VRB award level would be a function of the Navy's manpower needs at that time as well as the extent to which the prospect of an uncertain VRB award level had already helped to satisfy those requirements. Information concerning those factors would rarely be readily accessible to enlisted personnel making a reenlistment or extension decision, and we find no evidence in the legislative background of the 1965 amendments to warrant the conclusion that Congress intended enlisted personnel to make reenlistment decisions in the fact of such uncertainty.[29]

The Government authored these extensions contracts, and it could easily have inserted a provision limiting an en-

[28] The sum is "specific" in the sense that it is set by military authorities at some multiple of the Regular Reenlistment Bonus. As noted above, the multiple will vary among service ratings according to the need for enlisted personnel with particular skills.

[29] Indeed, Navy regulations governing reenlistment interviews for potential reenlistees eligible for the VRB require coverage of the "[a]dvantages of early reenlistment to obtain present amount of VRB vice uncertainty of future value of the VRB." BUPER INST 1133.18E, ¶ 9.a.(6) (Mar. 23, 1972). *See also* note 30 *infra*.

listed member's VRB eligibility to the award level in effect on the date of actual entry into the period of extended service. Undoubtedly, if such a provision had been included, the Navy would have witnessed fewer extensions of enlistment.[30] But there is no express limitation on eligibility, and the Government is therefore bound by the actual contract terms and the applicable military regulations. Although we recognize that these rather complex military regulations are not free from ambiguity, the factors outlined above lead us to conclude that under a reasonable interpretation of the contracts the appellants are entitled to the VRB award level in effect at the time they signed their extension contracts. Our conclusion in that regard is reinforced by our obligation to construe most strongly against the Gov-

[30] *See, e.g.*, Affidavit of Thomas W. Dietz, App. at 19 ("I would have definitely not signed the Extension of the Enlistment contract if the personnel involved in my counseling procedure had presented the possibility that the VRB could be withdrawn on a moments[*sic*] notice."). Such a contract provision would inform enlisted personnel that they would be making reenlistment decisions in the face of conditions of uncertainty. We note that as a result the effectiveness of the VRB program would depend not only on the expected value of the VRB award at the time of actual entry into the period of extended service, but also on the attitudes of enlisted personnel toward risk. Friedman & Savage, *The Utility Analysis of Choices Involving Risk*, 56 J. Pol. Econ. 279 (1948); *see* R. Posner, Economic Analysis of Law 72-73 (1972) (discussing the relevance of attitudes toward risk in the accident field). In effect, the Government's interpretation of the regulations (or a contract provision making that interpretation explicit) provides enlisted personnel with an opportunity to purchase a "lottery ticket" offers some probability of a VRB award equal to the award level in effect at the time the agreement is signed, some probability of a CRB award level less than that in effect at the time of the signing, and some probability of no VRB award at all. And enlisted personnel who are risk averse—that is, they are willing to pay a premium to avoid risk—might well decide against such a gamble, whereas the same personnel would be willing to extend their enlistment in exchange for a contractual promise by the government to offer a sum certain on the date of entry into extended service.

ernment, as against any other drafter of a contract, ambiguous contract terms that are subject to a reasonable and practical interpretation other than that offered by the drafter. *United States* v. *Seckinger*, 397 U.S. 203, 210 (1970); 3 A. Corbin. Contracts § 559 (1960). Since the regulations at issue recognize that eligibility can be attained prior to actual entry into the period of extended service, and since the Government's interpretation of the regulations, unlike that of the plaintiffs, is at odds with congressional intent,[31] we construe the contracts to mean that appellants are entitled to the VRB award level in effect when they signed their extension agreements.[32]

[31] The Government's current interpretation also stands in stark contrast to the Defense Department's recommendation to Congress that "[a] reenlistment bonus concentrates retention money at the reenlistment decision point." *See* slip opinion page 13 *supra*. The two statements can be reconciled only if the date of actual entry into the extension period is a "decision point,"—that is, a point at which plaintiffs could decide not to continue military service. But the Navy has emphasized, and the Government presently contends, that the extension agreements are binding and that the date of actual entry is not a "decision point" for these plaintiffs.

[32] When considered in the context of the entire VRB regulatory scheme, the Government's interpretation of VRB eligibility requirements has the potential of producing serious inequities. Under the relevant Department of Defense Directive, the Secretaries of the Military Departments and the Assistant Secretary of Defense are directed to conduct "an annual review of the retention and career manning situation in any military specialty that has attained or is projected to attain a *career manning* level of more than 105 percent." DOD Directive 1304.14, ¶ IV.F.1 (Sept. 3, 1970) (emphasis added). If, taking into account projected retention and career manning in the absence of the VRB award level, the award is no longer needed to avoid a significant shortage in career manning, the VRB for that specialty must be designated for reduction or termination. *Id.* at ¶ IV.F.1. a, b.

The *career manning level* is the ratio of the number of *career personnel* in a military specialty to the career requirements in that specialty. *Id.* at ¶ III.K. And *career personnel* is defined to include "first term personnel who are serving in an enlistment, as

C. *The 1974 Repeal of the Variable Reenlistment Bonus Program*

Effective June 1, 1974, Congress repealed the statutory provisions providing for the Regular Reenlistment Bonus and the Variable Reenlistment Bonus and substituted a provision authorizing a new "Selective Reenlistment Bonus" (SRB). Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Pub. L. No. 93-277, § 2(1), 37 U.S.C. § 308 (Supp. IV. 1974).[33] The 1974 amendments specifically

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extended, *or* an extension of enlistment that will total six or more years of active service." *Id.* at ¶ III.I (emphasis added). Consequently, appellants, by extending their enlistments at a time when the VRB award level was set at a multiple of four, may have contributed to the very satisfaction of Navy personnel requirements that led to termination of the VRB for the CTM rating. Indeed, in explaining to plaintiff Larionoff's elected representatives why he was ineligible for the VRB award, the Chief of Naval Personnel wrote: "Although the communications technician (maintenance) rating was formerly VRB eligible, *the most recent review of the manning levels* dictated that it be removed from the eligibility list." App. at 149 (emphasis added).

[33] The new statute provides in relevant part:

(a) A member of a uniformed service who—

(1) has completed at least twenty-one months of continuous active duty (other than for training) but not more than ten years of active duty;

(2) is designated as having a critical military skill by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy;

(3) is not receiving special pay under section 312a of this title; and

(4) reenlists or voluntarily extends his enlistment in a regular component of the service concerned for a period of at least three years;

may be paid a bonus, not to exceed six months of the basic pay to which he was entitled at the time of his discharge or release, multiplied by the number of years, or the monthly fractions thereof, of additional obligated service, not to exceed six years, or $15,000, whichever is the lesser amount. Obligated service in excess of twelve years will not be used for bonus computation.

provide that an enlisted member on active duty on the effective date of the amendments "who would have been eligible, at the end of his current or subsequent enlistment, for the [Regular Reenlistment Bonus] as it existed on the day before the effective date of [the amendments] shall continue to be eligible for the [RRB] as it existed on the day before the effective date of [the amendments]." But a similar savings clause was not enacted for enlisted personnel eligible for a Variable Reenlistment Bonus before the effective date of the 1974 amendments. Consequently, although it has not been raised by any of the parties, we are confronted with the question whether named plaintiff Johnson, who was scheduled to enter his period of extended service *after* the effective date of the 1974 amendments, is no longer entitled to receive a VRB.[34]

Since contractual rights against the government are property interests protected by the Fifth Amendment, Congressional power to abrogate existing government contracts is narrowly circumscribed. *Perry* v. *United States*, 294 U.S. 330 (1935); *Lynch* v. *United States*, 292 U.S. 571 (1934); *see Federal Housing Administration* v. *Darlington, Inc.*, 358 U.S. 84, 97-98 (1958) (Harlan, J., dissenting). And although Congress may constitutionally impair existing contract rights in the exercise of a paramount governmental power such as the "War Powers," U.S. Const. art. I, § 8, cl. 11, 12, 14, Congress is "without power *to reduce expenditures* by abrogating contractual obligations of the United States." *Lynch* v. *United States, supra*, 292 U.S. at 580 (emphasis added); *see id.* at 579. *Compare Schultz* v. *Clifford*, 303 F. Supp. 965 (D. Minn. 1968), *aff'd*, 417 F.2d

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[34] We are informed by the Government's brief that plaintiff Johnnie S. Johnson was scheduled to begin his period of extended service on August 28, 1974. Brief at 7 n. 9.

775 (8th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970); *Pfile* v. *Corcoran*, 287 F. Supp. 554 (D. Colo. 1968).

Although the stated purpose of the 1974 amendments was to "provide authority to grant enlistment and reenlistment bonuses to enlisted personnel on a selective basis to fill critical and shortage skill requirements in the armed services in an all-volunteer environment," H.R. Rep. No. 93-857, 93d Cong., 2d Sess. 3 (1974), our review of the legislative history leads us to conclude that the Congress was primarily concerned with reducing government expenditures by more narrowly tailoring the reenlistment bonus scheme to actual military requirements. *See* S. Rep. No. 93-659, 93d Cong., 2d Sess. (1973); H.R. Rep. No. 93-857, 93d Cong., 2d Sess. (1974); H.R. Conf. Rep. No. 93-985, 93d Cong., 2d Sess. (1974). The Department of Defense specifically recommended the 1974 amendments to Congress as "an opportunity to save money while simultaneously improving our management of reenlistment incentives." S. Rep. No. 93-659, 93d Cong., 2d Sess. 8 (1973); H.R. Rep. No. 93-857, 93d Cong., 2d Sess. 9 (1974).

Since there is absolutely no basis in the legislative history to justify a conclusion that Congress was exercising some paramount power enabling it to abrogate existing contract rights, plaintiff Johnson's contractual entitlement to a VRB stands unimpaired after the 1974 amendments.[35]

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[35] This identical question was recently presented by different groups of naval enlisted personnel to the District Court for the Eastern District of Virginia in *Carini* v. *United States*, Civil No. 74-88-NN (Jan. 7, 1975), to the District Court for the District of Hawaii in *Collins* v. *Schlesinger*, Civil No. 75-0053 (May 20, 1975), to the District Court for the Southern District of California in *Aiken* v. *United States*, Civil No. 75-0062-N (Aug. 26, 1975), and to the District Court for the District of Connecticut in *Caola* v. *United States*, Civil No. H-75-100 (Dec. 4, 1975). Those courts reached the same conclusion as we reach today.

We are aware that the Fourth Circuit has reversed the District Court decision in *Carini* on the ground that the 1965 statute was not "a part of the reenlistment agreement," slip opinion at 6, and that the "contract . . . anticipated possible statutory change," slip opinion at 8. Carini v. United States, No. 75-1399 (Dec. 19, 1975). We obviously disagree. The Government argued that the case before us turns primarily on the construction of the applicable military regulations. Brief at 15. And as our textual discussion indicates, we construe those regulations to mean that VRB eligibility attaches when an extension agreement is signed. Thus, under our view of the case, the contract clause did not anticipate possible statutory changes and an explicit clause would have been necessary to achieve that effect given existing regulations. *See* slip opinion, pages 21-22 *supra*.

The Fourth Circuit opinion in *Carini* also places some emphasis on the Congressional intent evidenced in a section of the Conference Report accompanying the 1974 statute ironically labeled "Clarification of interpretation of bill language." H.R. Rep. 93-985, 93d Cong., 2d Sess. 4 (1974). Even if we were to agree that the language in the report indicates that Congress intended to allow the members of this class to become eligible for the new Selective Reenlistment Bonus "if, during the initial enlistment period, the old reenlistment extension agreements are cancelled and new ones executed calling for a longr period of extended service," slip opinion at 6, we would still be unable to find any reason to justify congressional abrogation of existing contract obligations to members of the class.

D. The Issue of Rescission of the Extension Agreements

The amended complaint, asserting jurisdiction under the Tucker Act, 28 U.S.C. § 1346(a)(2), asked that the Government "be ordered to pay to each of the plaintiffs the bonus provided by his contract *and/or the contracts of the plaintiffs be deemed rescinded and declared of no further force and effect.*" App. at 211 (emphasis added). Plaintiffs now maintain that the District Court erred when it refused to declare the contracts rescinded.

Rescission is an equitable remedy, and we must keep in mind that courts exercising Tucker Act jurisdiction generally do not have jurisdiction over suits for equitable relief against the United States. *Richardson* v. *Morris*, 409 U.S.

464, 465 (1973); *see Lee* v. *Thorton*, 420 U.S. 139 (1975). The Act authorizes jurisdiction only over actions for money judgments. *United States* v. *King*, 395 U.S. 1, 2-3 (1969); *see United States* v. *Jones*, 131 U.S. 1 (1889). There nevertheless seems to be a narrow "exception" to this limitation on Tucker Act jurisdiction, in that "[w]here the relief is monetary, [courts exercising Tucker Act jurisdiction] can call upon such equitable concepts as rescission and reformation to help . . . reach the right result." *Quinault Allottee Association* v. *United States*, 453 F.2d 1272, 1274, n.1, 197 Ct. Cl. 134, 138 n.1 (1972); *see United States* v. *Milliken Imprinting Co.*, 202 U.S. 168, 173-74 (1906).

We have serious doubts as to whether the plaintiff's request for judicial rescission of their extension contract falls within this narrow exception since it is hard to conceive of how granting that request would be "in aid of [a money] judgment." *Blanc* v. *United States*, 244 F.2d 708, 709 (2d Cir. 1957). *Compare C. N. Monroe Manufacturing Co.* v. *United States*, 143 F. Supp. 449 (E.D. Mich. 1956); *Kemp* v. *United States*, 38 F. Supp. 568 (D. Md. 1941). *See also Universal Transistor Products Corp.* v. *United States*, 214 F. Supp. 486 (E.D.N.Y. 1963). We find it unnecessary to resolve these doubts one way or the other, however, since on the basis of the record before us we would find it impossible to sustain a judicial decree of rescission. The payment of VRBs to the plaintiffs is an adequate legal remedy, and we have been offered no evidence indicating that there are exceptional circumstances in this case that justify the grant of equitable relief.

We therefore conclude that the District Court properly limited the relief in this case to the award of VRBs.

III. Class Action Issues

On September 28, 1973, in the same order granting plaintiffs' motion for summary judgment, the District Court certified this suit as a class action under Rule 23(b)(1)(B)

of the Federal Rules of Civil Procedure.[36] The Government

[36] We note that the Government has not challenged on this appeal the merits of the District Court's ruling with respect to the maintenance of this suit as a class action under Rule 23(b)(1)(B). That subdivision covers cases in which "the prosecution of separate actions by or against individual members of the class would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." For a suit to qualify as a class action under this subdivision, it is not necessary for the nonclass judgment to be technically dispositive of the interests of the other members of the putative class, *see* 7A C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1774, at 14 (1972), but it must as a practical matter conclude the interests of those members.

It has been held that if the only practical effect which the putative class action would have on the interests of other members of the class is a *stare decisis* effect on actions filed in the same jurisdiction and perhaps a persuasive effect on actions filed in other jurisdictions, the suit would not qualify as a class action pursuant to Rule 23(b)(1)(B). *E.g.*, Lamar v. H & B Novelty & Loan Co., 489 F.2d 461, 467 (9th Cir. 1973); Richardson v. Hamilton Int'l. Corp., 62 F.R.D. 413 (E.D. Pa. 1974). As the Ninth Circuit recently observed, allowing the *stare decisis* consequences of an individual action to supply the practical disposition or substantial impairment of the rights of the class "would make the invocation of Rule 23(b)(1)(B) unchallengeable" in cases meeting the class action prerequisites of Rule 23(a). LaMar v. H & B Novelty & Loan Co., *supra*, 489 F.2d at 467.

In deciding not to challenge the merits of the District Court's ruling, the Government apparently concludes that this case meets the practical effect standard of Rule 23(b)(1)(B) precisely because the Government, unlike private litigants, is required to treat all class members alike. *See, e.g.*, Guadamuz v. Ash, 368 F. Supp. 1233, 1235 (D.D.C. 1973) (action maintained as a class action under Rule 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2)); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 291-92 (E.D. Pa. 1972) (defendant class action maintained pursuant to Rule 23(b)(1)(B)).

To the extent that there might be doubt that this suit qualifies for class action status under Rule 23(b)(1)(B), we note that the suit would appear to qualify for class action status under Rule

argues on this appeal that the District Court erred in certifying this suit as a class action because it did not make its class action determination "as soon as practicable after the commencement" of the action as required by Rule 23 (c)(1). The Government also presses the argument that due process required personal prejudgment notice to the easily identifiable members of this Rule 23(b)(1) class, and that the failure of the District Court to order such notice consequently requires reversal of the class action certification. Plaintiffs, who had asked the District Court to order the Government to disclose the names and addresses of members of the class, challenge on appeal the refusal of the District Court to honor that request.[37]

23(b)(1)(A), which covers cases in which the prosecution of separate actions by or against members of the class would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the party opposing the class. *See* Maricopa County Mun. Water Con. Dist. v. Looney, 219 F.2d 529 (9th Cir. 1955) (cited in Advisory Committee Note to Rule 23(b)(1)(A), 39 F.R.D. 100 (1966); Guadamuz v. Ash, *supra*. *See generally* 7A C. Wright & A. Miller, *supra*, § 1773 (1974 Supp.); Note, *Community Standards Class Actions, and Obscenity Under* Miller v. California, 88 HARV. L. REV. 1838, 1868-69 n.130 (1975). In their motion in the District Court to confirm the class, the named plaintiffs sought certification under Rule 23(b)(1)(A) as well as under Rules 23(b)(1)(B), 23(b)(2), and 23(b)(3).

In any event, the failure of the Government to challenge on appeal the propriety of the class designation eliminates the need for us to resolve that issue. Rizzo v. Goode, 44 U.S. L.W. 4095, 4098 n.7 (U.S. Jan. 21, 1976).

[37] We find it somewhat difficult to summarize the precise position taken by plaintiffs with respect to the disclosure issue. In their petition to the District Court for reconsideration of its decision, they state: "Although certified as a class under Rule 23(b)(1)(B), . . . the notice provisions of Rule 23(c) do apply as an element of due process in a given set of circumstances, Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (CA 2, 1968) and that the circumstances herein demand notice to the class." App. at 269. They then state in their brief on appeal that "[t]his defect may be cured in this

A. The Requirements of Rule 23(c)(1)

Rule 23(c)(1) provides:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

The Government argues that the District Court's class action certification must be reversed as inconsistent with Rule 23(c)(1) in that the District Court "did not make a class action determination until the entry of final judgment, some six months after the action commenced." Brief at 25-26.

Clearly, a District Court cannot simultaneously certify an action under Rule 23(b)(3) and enter a final judgment in the action since Rule 23(c)(2) [38] expressly requires *pre-*

Court." Brief at 19. Taken together, these statements could be read to assert that the full *notice requirements* of Rule 23(c)(2) are applicable, including notice concerning the opportunity to "opt out", but that those requirements can be satisfied even after the District Court has entered its judgment. There is, of course, no opportunity to "opt out" of a 23(b)(1) action. On the other hand, the citations in their brief to Fed. R. Civ. P. 23(d) can be read to assert that the District Court had authority under Rule 23(d) to require the Navy Department to *disclose* the names of the members of the class and that the failure of the District Court to exercise tha authority was error. We will proceed to treat the argument as one directed at a Rule 23(d) order requiring *disclosure* rather than as one directed at the Rule 23(c)(2) *notice* requirements.

[38] Rule 23(c)(2) provides:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court

judgment notice to the absent members of a Rule 23(b)(3) class concerning among other things, their opportunity to "opt out" of the class.[39] *See Elsen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974). But this suit was certified as a class action pursuant to Rule 23(b)(1)(B), and there is nothing in Rule 23 itself requiring *prejudgment* notice to members of a Rule 23(b)(1)(B) class. Putting to one side the question of a due process requirement of prejudgment notice to absent members of a Rule 23(b)(1) class, we are left with the question of the precise scope of Rule 23(c)(1)'s procedural requirements.

In that regard, we find persuasive a recent analysis of the issue by Justice (then Judge) Stevens:

> The rule unquestionably allows the district judge to exercise his discretion in deciding upon the earliest "practicable" time to determine whether the case is to be processed as a class action; but the text certainly implies, even if it does not state expressly, that such a decision should be made in advance of the ruling on tthe merits. For the explicit permission to alter or amend a certification order before decision on the merits plainly implies disapproval of such alteration or amendment thereafter. On the other hand, that degree of flexibility permitted before the merits are decided also indicates that in some cases the final certification need not be made *until* the moment the merits are decided.

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will exclude him from the class if he so requests by a specific date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

[39] Roberts v. American Airlines, No. 74-1108 (7th Cir. Dec. 8, 1975), slip opinion at 10-11; Peritz v. Liberty Loan Corp., 523 F.2d 349, 354 (7th Cir. 1975) ("Section 23(c)(1) makes it plain in the second sentence thereof that the order determining class status is to be made and finalized 'before the decision on the merits.' ").

Jimenez v. *Weinberger*, No. 75-1046 (7th Cir. Sept. 12, 1975), slip opinion at 11 (emphasis in original).

Applying that analysis to the facts of this case, we do not think that the District Court committed reversible error in simultaneously certifying the case as a class action and entering summary judgment for the plaintiffs. In the first place, although the Government is correct in stating that the class action was not certified until "some six months after the action commenced," the final certification cannot be considered unreasonably delayed. Plaintiffs filed this suit on March 30, 1973 "on behalf of themselves and on behalf of all others similarly situated," and they filed a motion to confirm the class on April 23, 1973. The Government, after requesting two extensions of time, eventually filed its memorandum in opposition to the motion to confirm the class on June 27, 1973. After the named plaintiffs filed responsive papers in early August, the District Court heard oral arguments on plaintiffs' various motions and directed the parties to complete the filing of additional papers by August 24, 1973. Although the District Court could have been more prompt in certifying the action, we do not consider the September 28, 1973 order untimely.[40]

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[40] "[T]he time when a hard determination is 'practicable' as to the propriety of a class action will obviously vary from case to case. . . . [I]t may not be possible to decide even tentatively near the outset of the case whether it shouldcontinue as a class action." Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 41-42 (1967). *See, e.g.*, Philadelphia Elec. Co. v. Anaconda American Brass Co., 42 F.R.D. 324, 325 (E.D. Pa. 1967) (the class action question will remain open for at least two or three months given the fact that "[c]ounsel have requested leave to file affidavits, counter affidavits and briefs on this issue, and have indicated that they wish oral argument and possible additional discovery. . . ."). We think it was appropriate for the District Court to wait at least until the Government provided additional background information relevant to the issue of maintenance of the suit as a class action. *See, e.g.*, Baxter v. Savannah Sugar Ref. Corp., 46 F.R.D. 56, 5960 (S.D. Ga. 1968).

Moreover, absent some showing of actual prejudice either to the Government or to the absent class members, we cannot conclude that the simultaneous entry of the judgment and the class action certification was reversible error. The only prejudicial factor which the Government suggests in this case is that simultaneous entry of the orders precludes the *prejudgment* notice to absent class members that it is allegedly required under concepts of due process. It is to that issue that we now turn.

B. Due Process Notice Requirements

This case thrusts us directly into the controversy over the precise prejudgment notice requirements in Rule 23 (b)(1) class actions.[41] The express language of Rule 23 requires prejudgment notice only to absent members of a Rule 23(b)(3) class, but a number of courts have concluded that "notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions." *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555, 564-65 (2d Cir. 1968), *on remand,* 52 F.R.D. 253 (S.D.N.Y. 1971), 54 F.R.D. 565 (S.D.N.Y. 1972), *rev'd.,* 479 F.2d 1005 (2d Cir. 1973), *vacated,* 417 U.S. 156 (1974). *Accord, Schrader* v. *Selective Service System Local Board No. 76,* 470 F.2d 73, 75 (7th Cir.), *cert. denied,* 409 U.S. 1085 (1972); *Zeilstra* v. *Tarr,* 466 F.2d 111, 113 (6th Cir. 1972) (dictum); *e.g., Branham* v. *General Electric Company,* 63 F.R.D. 667, 669-71 (M.D. Tenn. 1974); *Richmond Black Police Officers Association* v.

[41] The existing literature and case discussion concerning this due process issue calls to mind a remark that Professor George Stigler made in the opening section of one of his major contributions to the theory of oligopoly: "No one has the right, and few the ability, to lure economists into reading another article on oligopoly theory without some advance indication of its alleged contribution." Stigler, *A Theory of Oligopoly,* 72 J. Pol. Econ. 44 (1964). Fortunately, judges, unlike economists, have a captive audience.

Richmond, 386 F. Supp. 151, 158 (E.D. Va. 1974). We note, however, that there is also considerable authority for the position that prejudgment notice to absent class members is not required in actions certified under sections of the Rule other than 23(b)(3). *Katz* v. *Carte Blanche Corp.,* 496 F.2d 747, 756 (3d Cir.) (Rules 23(b)(1) and 23(b)(2)), *cert. denied,* 419 U.S. 885 (1974); *Yaffe* v. *Powers,* 454 F.2d 1362, 1366 (1st Cir. 1972) (Rule 23(b)(2)); *Johnson* v. *Georgia Highway Express, Inc.,* 417 F.2d 1122, 1125 (5th Cir. 1969) (Rule 23(b)(2)) (by implication); *id.* at 1127 n.1 (Rule 23(b)(2)), Godbold, J., concurring); *e.g., Lynch* v. *Household Finance Corp.,* 360 F. Supp. 720, 722 n.3 (D. Conn. 1973) (three-judge court) (Rule 23(b)(2)); *Woodward* v. *Rogers,* 344 F. Supp. 974, 980 n.10 (D.D.C. 1972), *aff'd without opinion,* 486 F.2d 1317 (D.C. Cir. 1973) (Rule 23(b)(2)); *Northern Gas Company* v. *Grounds,* 292 F. Supp. 619, 636 (D. Kan. 1968) (Rules 23(b)(1) and 23(b)(2)); *Johnson* v. *Baton Rouge,* 50 R.F.D. 295, 299 (E.D. La. 1970) (Rule 23(b)(2)). *See also* 3B Moore's Federal Practice ¶ 23.55 (Rules 23(b)(1) and 23(b)(2)); 7A C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1786 (Rules 23(b)(1) and 23(b)(2)). As the extent of the controversy among the various courts no doubt suggests, the due process issue is a difficult one. But our review of recent decisions in this and other federal courts indicates that the controversy has diminished considerably after the Supreme Court's decisions in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974) and *Sosna* v. *Iowa,* 419 U.S. 393 (1975).

The question before the Court in *Eisen* was whether Rule 23(c)(2), which requires in Rule 23(b)(3) actions "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," was satisfied by notice through publication rather than individual notice to the two and one quarter million easily identifiable members of a Rule 23(b)

(3) class.[42] Noting that the language of the Rule is "unmistakeable", the Court held that individual notice is the "best practicable notice" with respect to those class members whose names and addresses are easily identifiable. At the same time, however, the Court emphasized that it was concerned "only with the notice requirements of subdivision (c)(2)," which is by its terms inapplicable to actions certified under 23(b)(1) or 23(b)(2).[43] 417 U.S. at 177 n.14.

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[42] The actual notification scheme consisted of four elements:

(1) individual notice to all member firms of the Exchange and to commercial banks with large trust departments; (2) individual notice to the approximately 2,000 identifiable class members with 10 or more odd-lot transactions during the relevant period; (3) individual notice to an additional 5,000 class members selected at random; and (4) prominent publication notice in the Wall Street Journal and in other newspapers in New York and California. The [District Court] calculated that this package would cost approximately $21,720.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 167 (1974).

[43] The Advisory Committee's Note to Rule 23 makes it clear that the Advisory Committee thought that due process required prejudgment notice in Rule 23(b)(3) cases: "[M]andatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject. 39 F.R.D. 69, 106-107, *citing* Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306 (1950) and similar cases.

It is uncertain, however, whether the Supreme Court would conclude that due process requires *individual* prejudgment notice. As Professor Dam has noted, "[a] close reading of Mr. Justice Powell's opinion [in *Eisen*] suggests that he did not want to base the notice holding on the Constitution. Yet his plain meaning methodology in interpreting the Rule apparently does not satisfy even him. He returns time and again to due process considerations to give plausibility to his literalist interpretation of the Rule." *Class Action Notice: Who Needs It?*, 1974 Sup. Ct. Rev. 97, 110. For Professor Dam's discussion of the structure of the opinion in terms of its reliance on the wording of Rule 23 and on due process considerations, see *id.* at 109-111.

It has been persuasively argued that *Mullane* and similar cases do not compel the conclusion that individual notice is required in all

Sosna, decided just last Term, provides some firm indication that the Court intends to pursue a different approach to notice problems in actions certified under sections other than 23(b(3). *Sosna* involved a class suit for declaratory and injunctive relief challenging the constitutionality of Iowa's durational residency requirement for divorce petitions. Recognizing that "it [was] contemplated that all members of the class will be bound by the ultimate ruling on the merits," 419 U.S. at 403, the Court first satisfied itself that the conditions of Rule 23(a) had been met. *Id.* As to the issue of notice in a Rule 23(b)(2) action, the Court stated in a footnote that "the problems associated with a Rule 23(b)(3) class action, which were considered by this Court last Term [in *Eisen*], are not present in this case." *Id.* at 397 n.4.

Recognizing that the Court seems to have relied primarily on the language of the Rule rather than on constitutional grounds, a number of lower federal courts have concluded that *Eisen* and *Sosna* strongly imply that notice is not required in actions brought under subdivisions other than 23(b)(3). *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 878-79 (5th Cir. 1975) (Rules 23(b)(1) and 23(b)(2)); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239, 255-57 (3d Cir.) (Rules 23(b)(2)), *cert. denied*, 421 U.S. 1011 (1975); *Mattern* v. *Weinberger*, 519 F.2d 150, 157-58 (3d Cir. 1975) (Rule 23(b)(2)) (*citing Wetzel, supra*); *Molina* v. *Weinberger*, No. 74-1611 (9th Cir. Oct. 1, 1975), slip opinion at 11-14 (Rule 23 (b)(2));

Rule 23(b)(3) class actions. *See, e.g.*, Note, *Managing the Large Class Action*: Eisen v. Carlisle & Jacquelin, 87 Harv. L. Rev. 426, 433-441 (1973). But even were the Supreme Court to conclude that due process required individual notice in Rule 23(b)(3) actions, application of the *Mullane* balancing approach could lead to different results with respect to Rule 23(b)(1) and 23(b)(2) actions given the different interests at stake. Indeed, the subsequent textual discussion of *Sosna* suggests that very conclusion.

e.g., American Finance System, Inc. v. *Harlow,* 65 F.R.D. 94, 110-11 (D. Md. 1974) (Rule 23(b)(2)). Indeed, the Second Circuit has now concluded that prejudgment notice is not required in 23(b)(2) actions. *Frost* v. *Weinberger,* 515 F.2d 57, 65 (2d Cir. 1975) (Friendly, J.), *see Ives* v. *W. T. Grant Company,* No. 74-462 (2d Cir. July 31, 1975), slip opinion at 5252, and the Seventh Circuit has indicated that its *Schrader* opinion will have to be reexamined in light of *Eisen, Bijeol* v. *Benson,* 513 F.2d 965, 968 n.3 (7th Cir. 1975).

Our own resolution of the due process claim in a Rule 23(b)(1) action must also take into account the recent decision by this court in *Childs* v. *United States Board of Parole,* 511 F.2d 1270 (D.C. Cir. 1974). The panel in that case, citing the Supreme Court's *Eisen* decision, upheld the District Court's grant of relief to members of a Rule 23(b)(2) class despite an argument by the Government that the absence of prejudgment notice in that case violated due process. *Id.* at 1276. We think that a similar resolution of the due process issue should obtain here; the factors that have prompted courts and commentators to conclude that due process does not require notice in Rule 23(b)(2) class actions are equally applicable to actions certified under Rule 23(b)(1).[44]

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[44] In representative actions brought under [subdivisions other than Rule 23(b)(3)], the class generally will be more cohesive for example, in many instances each member ill be affected as a practical matter by a judgment obtained by another member if individual actions were instituted. Similarly, it is less likely that there will be special defenses or issues relating to individual members of a Rule 23(b)(1) or Rule 23(b)(2) class, than in the case of a Rule 23(b)(3) class. This means that there is less reason to be concerned about each member of the class having an opportunity to be present. Thus, in suits under subdivisions (b)(1) or (b)(2), once the court determines that the members are adequately represented as required by Rule 23(a)(4), it is reasonably certain that the named representatives will protect the absent members and give them the functional equivalent of a day in court.

In keeping with this philosophy, class members in Rule 23(b)(1) and Rule 23(b)(2) actions are not provided an opportunity by the rule to exclude themselves from the action as is true in Rule 23(b)(3) actions. Because they do not have the alternative of bringing a separate suit, notice really serves only to allow those members the opportunity to decide if they want to intervene or to monitor the representation of their rights. As a safety valve, the court is given discretion by Rule 23(d)(2) to direct notice to be given in any class action "for the protection of the members of the class or otherwise for the fair conduct of the action"—a power that is inherent in the court at least in situations having due process overtones.

7A C. Wright & A. Miller, *supra,* § 1786 at 143-44 (footnotes omitted). *See* Molina v. Weinberger, No. 74-1611 (9th Cir. Oct. 1, 1975), slip opinion at 12-13.

Unlike the situation with respect to members of a Rule 23(b)(3) class, the members of a Rule 23(b)(1) class are likely to be more unified in the sense that there will probably be little interest on the part of individual members in controlling and directing their own separate litigation on the question at issue in the class suit. Indeed, in a Rule 23(b)(1)(B) class action, adjudications with respect to individual members would as a practical matter dispose of the interests of the absent members or substantially impair or impede their ability to protect their interests. At best, then, notice provides absent members with an opportunity to monitor the representation of their rights. In such cases, we think that due process is satisfied if the procedure adopted "fairly insures the protection of the interests of absent parties who are to be bound by it." *Hansberry* v. *Lee,* 311 U.S. 32, 42 (1940). We agree with the Ninth Circuit's recent observation that "[o]nly when the purposes in providing class members an opportunity to signify whether representation by named plaintiffs is fair and adequate or to intervene to present additional claims or to otherwise come into the action to, for example, submit views

as amici curiae, are in need of being served, does due process require the direction of some sort of notice to absent members" of a Rule (2)(1) class. *Molina* v. *Weinberger, supra,* slip opinion at 13 (Rule 23(b)(2)). In such cases, notice can be provided pursuant to Rule 23(d)(2).[45] Since in our view this case does not present special circumstances requiring prejudgment notice, we uphold the District Court's order certifying the class.

C. Disclosure Under Rule 23(d)

Plaintiffs argue that the District Court erred in refusing to grant their request for an order directing the Government to disclose the names and addresses of the members of the plaintiff class. Having considered the context in which this request was made, we cannot conclude that the District Court abused its discretion in refusing to issue a Rule 23(d) order.

On May 8, 1973 the attorneys for the named plaintiffs wrote to the United States Attorney's Office stating that "it would be helpful for the Court and plaintiffs if the U.S. Navy were to prepare a list of the names and locations of the plaintiffs [sic] class so that we would be in a position upon Court ruling to notify those members of the class." The United States Attorney did not respond favorably to the request. Plaintiffs apparently first mentioned the disclosure issue to the District Court in their opposition to the Government's initial motion for an extension of time in

[45] Rule 23(d)(2) provides:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

which to respond to the motion to confirm the class. In their written opposition, plaintiffs mentioned their correspondence with the Government, but failed to request a Rule 23(d) order.

As noted earlier, the Government filed a second motion for an extension of time in which to respond to plaintiffs' motion to confirm the class, and it was in their written opposition to that motion that plaintiffs formally requested an order requiring the Government to disclose the names and addresses of the class members. No reasons were offered to support that request; plaintiffs simply asked for a disclosure order "in addition" to a requested order fining the Government $500 per day per plaintiff for its continued delay in filing responsive papers.

The judgment entered by the District Court complied in all respects with Rule 23(c) in that it described the members of the plaintiff class. Absent some articulation of the reasons why plaintiffs thought a disclosure order would be necessary to protect the interests of absent class members, the District Court certainly cannot be said to have abused its discretion in denying the requested order.

IV. Attorneys' Fees

Plaintiffs' counsel asked the District Court to award them attorneys' fees in the amount of $175,000, approximately 25% of their estimate of the total class recovery. The District Court chose not to follow a percentage of recovery approach and instead relied on the standards for computing attorneys' fees that it had fashioned in *Kiser* v. *Miller,* 364 F. Supp. 1311 (D.D.C. 1973). Application of the District Court's *Kiser* approach to this case produced an award of $14,729. Shortly after appellate briefs in this case were filed, this court approved the approach which the District Court had taken in *Kiser, Kiser* v. *Huge,* No. 73-1393 (D.C. Cir. August 5, 1974), slip opinion at 29-37, 517 F.2d

at 1289-93.[46] Recognizing here, as we did in *Kiser*, that "we must pay considerable deference to the District Court's exercise of equitable discretion in setting [attorneys'] fees," slip opinion at 29, 517 F.2d at 1289, we cannot say that the District Court's evaluation of the relevant factors produced an unreasonable, albeit quite modest, award.

The District Court properly withheld calculation of that portion of the attorneys' fees award dealing with the efforts of counsel directed at this appeal, *see Kiser, supra,* slip opinion at 35-36, 517 F.2d at 1292, and we therefore remand the case to the District Court for a determination with respect to that question.

It is so ordered.

[46] This court granted rehearing en banc on October 2, 1974, but eventually reinstated that portion of the panel opinion dealing with the attorneys' fees issue. Pete v. UMWA Welfare & Retirement Fund, 517 F.2d 1275, 1279, 1289-93 (D.C. Cir. 1975).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975
CIVIL ACTION 626-73

[Filed April 29, 1976, George A. Fisher, Clerk.]

No 74-1211

NICHOLAS J. LARIONOFF, JR., et al.

v.

THE UNITED STATES OF AMERICA, et al., *Appellants*

No. 74-1212

NICHOLAS J. LARIONOFF, JR., et al., *Appellants*

v.

THE UNITED STATES OF AMERICA et al.

Before: Richard T. Rives*, Senior Circuit Judge for the Fifth Circuit; Wright and McGowan, Circuit Judges.

ORDER

Upon consideration of the defendants-appellants-cross appellees' petition for rehearing, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam

For the Court:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Statement of Circuit Judge McGowan, joined in by Senior Circuit Judge Rives and Circuit Judge Wright, as to why they voted to deny hearing.

* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

The Government has filed a petition for rehearing and a suggestion for rehearing *en banc* on the grounds that: (1) the panel opinion "conflict[s] with prior decisions of this Court and with decisions of the Supreme Court holding that public benefits such as the variable reenlistment bonus can never be the subject of 'contract rights' and in the discretion of Congress may be reduced or terminated at any time before they are received"; and (2) the panel opinion "has unduly restricted the paramount powers of Congress, has disregarded a clear declaration of congressional purpose, and has significantly restricted the scope of an important constitutional grant of power" in ruling that Congress was not free to abrogate existing contract rights to the VRB. Because we are of the view that neither statement accurately reflects the scope of the panel decision, we deny the petition for rehearing.

Before discussing the three primary contentions pressed upon us by the Government, we note that the petition for rehearing focuses only on named plaintiff Johnson and other members of the class who began serving their periods of extended service after the *effective* date of the 1974 statute repealing the Variable Reenlistment Bonus system.[1] Admittedly, the Government does seek a reexamination of the other issues to insure a consistent result among all

[1] We think it appropriate to note why the panel "decided to rule on the effect of the new Act on plaintiff Johnson, even though it acknowledged that the matter had not been raised (and had not been briefed or argued)." Petition at 6. The panel reached the issue precisely because it had no other choice; one of the named plaintiffs had entered into his period of extension *after* the repeal of the statute authorizing the VRB system, and consequently the panel had to satisfy itself that the affirmance of the District Court's grant of relief as to Johnson and others similarly situated was not barred by the subsequent statutory change. The panel purposefully noted in the opinion that the issue had not been raised to highlight the fact that at no time in the course of this appeal did the parties notify the court of the repeal of the authorizing statute.

plaintiffs, but the primary emphasis in the petition is on the disposition of the case given the 1974 repeal of the statute, which is discussed at Part II. C. of the panel opinion.

I

The Government first argues that named plaintiff Johnson had no contract right to a VRB award since "the very nature of the statute . . . which authorized the VRB was such as to prevent the VRB from ever becoming the subject of a 'contractual entitlement' ".[2] Petition at 11. The Government takes the position that the VRB is a "gratuity" which may be altered or repudiated at any time. Our problem with this approach is that it fails to address the narrow issue in the case; the question is not whether a VRB can under some circumstances be considered a gratuity, but whether it ripened to a contract right under the circumstances presented in this record. To be sure, in some contexts, reenlistment bonus awards are "gratuities"; the panel does not, and indeed would not, take the position that once having established a VRB award system the Congress cannot terminate it. As to those enlisted personnel who were planning to reenlist but who took no binding action in that regard prior to the effective date of the repeal, the VRB is a "gratuity" rather than a contract right. This point is illustrated by *United States* v. *Dickerson*, 310 U.S.

[2] We find somewhat disconcerting the Government's statement that the panel opinion "does not identify the source" of the contractual entitlement to a VRB, and that as a result the Government has had to assume that the contractual entitlement finding is based on the language in the extension agreements promising the named plaintiffs such "pay" as would accrue to them during their periods of extended service. Petition at 7. As footnote 23 of the panel opinion expressly notes, the Government conceded in its brief that the term "pay" in the extension agremnts includes VRB awards, and we reject any new suggestion to the contrary in the petition for rehearing.

554 (1940), which concerned congressional action on June 21 of 1938 suspending for the fiscal year July 1, 1938 to June 30, 1939 a statutorily authorized reenlistment bonus. Dickerson was discharged on July 21, 1938 and reenlisted the very next day. His expectation that he would receive a bonus upon reenlistment did not confer a contractual right to those benefits, and the Court held that he was covered by the congressional action on June 21 prospectively suspending the reenlistment bonus.[3]

But we do not read *Dickerson* to mean that one can never claim a contract right to a benefit which in some contexts has been accurately labeled a gratuity. That just the oppo-

[3] To the same effect are Richardson v. Belcher, 404 U.S. 78 (1971) and Flemming v. Nestor, 363 U.S. 603 (1960), two cases with which the panel opinion allegedly conflicts. In *Belcher*, the plaintiff was receiving social security disability benefits of approximately $330 per month when Congress amended the Social Security law to require a reduction in benefits to reflect receipt of state workmen's compnsation benefits. As a result of the amendment, the plaintiff's disability benefits were reduced to approximately $225 per month. The Court expressly noted that "an expectation of benefits [does not] confer a contractual right to receive the expected amounts." 404 U.S. at 80. In *Flemming*, the plaintiff's old age benefits were terminated, as required by statute, when he was deported. The Court there noted: "[E]ach worker's benefits, flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation. *It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.*" 363 U.S. at 609-10. (emphasis added). Named plaintiff Johnson' right to the benefit of a VRB is bottomed on his contractual obligation to serve his country for an additional two years, and the VRB award depended directly on his willingness to sign an agreement to extend his service.

The other "gratuity" cases relied on by the Government resemble *Belcher* and *Flemming*, rather than the case of the holder of an annuity. *See, e.g.*, Thompson v. Gleason, 317 F.2d 90 (D.C. Cir. 1962) (disability benefits); Barnett v. Hines, 105 F.2d 96 (D.C. Cir.), *cert. denied*, 308 U.S. 573 (1939) (retirement pay).

site is true is illustrated by the Supreme Court cases cited by the Government dealing with changes in the salaries of Government officials. For example, in *Fisk* v. *Jefferson Police Jury* the Supreme Court noted:

> [T]hough when appointed the law has provided a fixed compensation for his services, there is no contract which forbids the legislature or other proper authority to change the rate of compensation for salary or services after the change is made, though this may include a part of the term of the office then unexpired. Butler v. Pennsylvania, 10 How. 402.
>
> But after the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for the services at that rate. This contract is a completed contract.

116 U.S. 131, 133-34 (1885).

The salary cases indicate that once someone agrees to perform certain services in exchange for a given sum of money, and the Government has received that performance —or, as in this case, insists on receiving it[4]—the case is different; the "gratuity" becomes a contractual right.[5]

[4] Plaintiff Johnson's situation differs in one important respect from that of the Government officials in the salary cases: he is not free to leave his job. *Compare* Embry v. United States, 100 U.S. 680, 685 (1879) ("If an officer is not satisfied with what the law gives him for his services, he may resign."). Consequently, the crucial factor concerning contractual entitlement is not whether named plaintiff Johnson has fully served his two year extension, but whether he is required to do so.

[5] In this regard, the Government's citation of Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 *Harv. L. Rev.* 692 (1960) is slightly misleading. The Government quotes Hochman's statement that gratuities "may be altered or repudiated at any time until the benefits conferred by them are actual-

Thus, our conclusion with respect to the "gratuity" versus "contract right" issue is that mere labels are neither helpful nor determinative. The issue is not whether a given claim to money resembles a "gratuity" in benevolent purpose, but whether the claim *sub judice* differs from a gratuity fundamentally in legal incidents. *See Lynch* v. *United States,* 292 U.S. 571, 576-77 (1934). Here, unlike the social security and other gratuity cases relied on by the Government, there is an agreement between the parties and the plaintiffs have undertaken a serious commitment in order to acquire the right tc a VRB, namely, the promise to spend an additional two years in military service. The Government now seeks to enforce the promise to serve and at the same time label the promise it offered in return a mere gratuity. The cases relied on by the Government do not justify that result.[6]

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ly received." *Id.* at 724. But Hochman goes on to note that the "key element" with respect to whether a benefit is a gratuity appears to be "the absence of any financial cost in the acquisition of the right based upon the original statute." *Id.* at 725: Hochman argues that:

> It should be stressed that the reliance required to remove a right from the category of gratuity . . . is a financial detriment in the acquisition of the right, and not merely reliance on the right after it accrues, as, for example, the making of a financial commitment in reliance upon the statute. The reason for this stricter requirement is probably similar to that encountered in the cases sustaining the extension of statutes of limitation; the . . . gratuity is given by a statute for public purposes which are not controlled by the merits of the donee's claim to the right. Under these circumstances, the Court is reluctant to permit the donee to obstruct a reassessment of these purposes by the legislature.

Id. at 726 (footnote omitted). We would find it difficult to conclude that there was no financial cost in the acquisition of the right to a VRB or that the right to a VRB is not controlled by the merits of the enlisted person's claim—namely, willingness to extend his period of service.

[6] The Government did not press this gratuity argument in its initial brief. The reason for that may be that as the other named plaintiffs who began serving their extensions prior to the effective date of the repeal, the termination of the alleged "gratuity" was achieved by military regulation rather than by statute. *See* Carini v. United States, 528 F.2d 738, 741 n.7 (4th Cir. 1975). But if the Government is of the view that only Congress could terminate the "gratuity," we fail to see how a reexamination of the issues with respect to the named plaintiffs other than Johnson would produce a consistent result. *See* Petition at 15.

II

The Government raises a second but equally unpersuasive argument as to why named plaintiff Johnson did not have a contract right to a VRB award, namely, that enlisted documents must be construed to incorporate not only the statutes in force at the time the agreement is signed but future changes in those statutes as well. Petition at 8. The Government's point on this issue is certainly accurate as to regular pay for enlistees, and cases such as *Johnson* v. *Powell,* 414 F.2d 1060 (5th Cir. 1969), indicate that the Government's point has broad applicability. But this does not mean that Congress is without authority to decide to promise a specific sum, rather than an uncertain sum, to achieve a given result, and this is precisely how the panel interpreted the extension agreement. Our review of the legislative history—which is clear—and the regulations—which at times are ambiguous—led us to conclude that Congress intended—and the regulations provided—a promise to pay a specific sum (in the form of a VRB) not dependent on future change.

As we read the petition, the Government does not argue that Congress is without power to establish a VRB scheme not dependent on future change. Instead, it argues that the contract for a VRB is like the normal contract for military pay—that is, a contract which anticipates future changes. But that is simply to say that the Government disagrees with the panel's interpretation of the contract; the argument was considered and rejected by the panel, and mere disagreement with the result does not warrant rehearing.

We stress that this is the only point on which we are in conflict with the Fourth Circuit. In *Carini* v. *United States*, 528 F.2d 738 (1975), that court took the position that the contract at issue anticipated possible statutory change, a result reached without analysis of the legislative history or applicable regulations. Moreover, as we indicated at footnote 35 in the panel opinion, all four district courts ruling on the issue disagree with the approach taken by the Fourth Circuit.[7]

III

The final argument raised by the Government is that even if named plaintiff Johnson had a contractual right to a VRB award, Congress was exercising a paramount power in repealing the statute and thus under *Lynch* v. *United States*, 292 U.S. 571 (1934), was constitutionally free to abrogate existing contract rights.[8] The Government agrees with the panel's view that there was a fiscal purpose behind the Act, but maintains that "the Act represents a legitimate exercise of Congress' paramount power to 'raise and support armies' and 'to make rules for the government and regulation of the land and naval forces.' " Petition at 15. This is so because "the purpose of the Act was to provide the Defense Department with the recruitment tools it needed to fill critical skill needs in the new All-Volunteer Force." *Id.* at 14. The Government's analysis of the legislative history indicates that the military departments found two deficiencies in the then effective bonus scheme: the authorization of a regular, as opposed to variable, reenlistment bonus without regard to specialty; and the failure to provide a VRB for reenlistments subsequent to the first reenlistment.

[7] The Fourth Circuit itself was not pleased with the result it felt obliged to reach: "While we hold that there is no enforceable contract right to the payment of the VRBs under the now repealed § 308(g), the situation of these plaintiffs is most appealing. .. . Under the circumstances, the Congress may wish to reconsider their situation and the moral claims they have against the United States." 528 F.2d at 741-42.

[8] The Government maintains that it is not clear that *Lynch* sets the correct standard, but nevertheless appears to be willing to concede for purposes of this appeal that the *Lynch* standard applies. Petition at 13 & n.9. Whether *Lynch* requires the exercise of a paramount power or something less—whatever that may be—it is clear that abrogation of contract rights for the sole purpose of reducing expenditures is not constitutionally sanctioned. Since in our view that is the only justification for *retroactive* termination as to named plaintiff Johnson, we need not rehear the case to consider the issue of the outer limits of the *Lynch* doctrine.

We have no disagreement with the Government's assessment of these purposes, but the determinative factor is that they have nothing to do with enlisted personnel who had already agreed to extend their enlistments before Congress repeated the prior statute. The purposes identified by the Goernment speak in prospective terms and are completely unrelated to men who had already agreed to serve the additional two years; as a result, they cannot be used to justify a change in the terms of already binding extension agreements.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 75-2935, 75-2967

EARL B. COLLINS, et al.,
Plaintiffs-Appellees and Cross-Appellants,

v.

DONALD H. RUMSFELD, et al.,
Defendants-Appellants and Cross-Appellees.
and other consolidated cases

Memorandum

Nos. 75-3238, 75-3432, 75-3348, 75-3559

Op Appeals from the United States District Court for the District of Hawaii; the United States District Court for the Southern District of California; and the United States District Court for the Central District of California

Before: CHAMBERS and SNEED, Circuit Judges, and SWEIGERT,* District Judge

One "K" represents the government in the above appeal. He is a man of deep religious faith and must eschew worldly matters and be with his family from sundown on Friday until one hour after sundown on Saturday.

"K," a government attorney in Washington, D.C., informally approached a deputy in our clerk's office some weeks ago, stating his problem and requested that he not be calendared for argument on any Friday so that there would be no conflict for him between church and state. He

* The Honorable William T. Sweigert, United States Senior District Judge from the Northern District of California, sitting by designation.

seems to have given no notice to his opponents of his unilateral approach to the court. I assume this was because he assumed that he was speaking in behalf of his faith instead of himself.

The deputy to whom he talked at least impliedly agreed to take care of him. But, alas, another made up the May calendar. So, there was a slip-up in the calendar in the absence of a written request.

Counsel is now calendared for Friday, May 14, 1976, at 9:30 a.m. If adhered to, he will get home to Silver Spring, Maryland, slightly after sunset.

Our deputy is not of Mr. "K's" faith, but she is a deeply religious person and with that goes respect for another's faith. So, she overlooked, "What about notice?" If the request had been on any other ground, I could testify that our deputy would have required notice to the opponent and that the request be in writing. Most of the complaints on our clerk's office are that the office is too strict.

The government attorney, "K," who didn't bother to give notice, now wants specific performance on his request, just as if there were a consideration for it. And he shows some indignation.

His opponents are even more indignant. How did this happen without notice to them? "If one can get his *day* (under the table), can one also get one's private panel, or even get a unilateral presentation on the merits to the court" they seem to be thinking, but not saying. Private counsel show calendars of their own both before and after May 14 that prevent them from acquiescing in any other nearby date.

Further, we are unable to furnish the same designated panel again for some time.

How do we solve it?

This is it: The court will convene at 7:30 a.m., Friday, May 14, 1976, to permit government counsel to argue his case, get out to the airport, and back to his home in Silver Spring, Maryland, before sunset.

By not complying with our rules, counsel will inconvenience about thirty people with a 7:30 a.m. hearing.

If West Publishing Company, or anyone else, is looking for a headnote on this memorandum today, it is:

> The First Amendment to the Constitution as to the free exercise of religion is not abridged if counsel observes the rule of giving an opponent notice.

The clerk will calendar as indicated above.

RICHARD M. CHAMBERS,
Chief Judge.

STATUTORY APPENDIX

Constitution of the United States, Article III, Section 2

[*Jurisdiction*]

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

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Constitution of the United States, Amendment V

[*Rights of Accused in Criminal Proceedings*]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval

forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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Constitution of the United States, Amendment XIV

Section 1.

[*Citizenship Rights Not to Be Abridged by States*]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

[*Apportionment of Representatives in Congress*]

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridge, except for participation in rebellion, or other crime, the basis of repre-

sentation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

[*Persons Disqualified from Holding Office*]

No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each house, remove such disability.

Section 4.

[*What Public Debts Are Valid*]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

[*Power to Enforce This Article*]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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28 U.S.C. 1346(a)(2)

1346. *United States as defendant.*—(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

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28 U.S.C. 1391(e)

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure [Rules, Part 1] except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought. (June 25, 1948, c. 646, § 1, 62 Stat. 935; Oct. 5, 1962, P. L. 87-748, § 2, Stat. 744; Dec. 23, 1963, P. L. 88-234, 77 Stat. 473; Nov. 2, 1966, P. L. 89-714, § 2, 80 Stat. 1111.)

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28 U.S.C. 1254(1)

1254. *Courts of appeals—Certiorari—Appeal—Certified questions.*—Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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37 U.S.C. 308 (1968)

308. *Special pay—Reenlistment bonus.*—(a) Subject to subsections (b) and (c) of this section, a member of a uniformed service who reenlists in a regular component of the service concerned within three months after the date of his discharge or release from compulsory or voluntary active duty (other than for training), or who voluntarily extends his enlistment for at least two years, and who is not covered by section 207 of the Career Compensation Act of 1949, as amended (70 Stat. 338), is entitled to a bonus computed as follows:

• • • • • • • • • • •

(b) A member who reenlists—

(1) during his prescribed period of basic recruit training; or

(2) after completing 20 years of active Federal service;

is not entitled to a bonus. A member who reenlists before completing 20 years of active Federal service, but who will, under that enlistment, complete more than 20 years of that service, is entitled to a bonus computed by using as a multiplier only the number of years that, when added to his previous service, totals 20 years.

(c) The total amount that may be paid to a member under this section, or under this section and any other law authorizing a reenlistment bonus, may not be more than $2,000.

(d) An officer of a uniformed service who reenlists in that service within three months after his release from active duty as an officer is entitled to a bonus computed under subsection (a) of this section, if he served as an enlisted member in that service immediately before serving as an officer. For the purposes of this subsection, the monthly basic pay, or appropriate fraction if the member received a bonus for a prior enlistment, of the grade in which he is enlisted, computed in accordance with his years of service computed under section 205 of this title, shall be used in column 1 of the table in subsection (a) of this section instead of the monthly basic pay to which he was entitled at the time of his release from active duty as an officer.

(e) Under regulations approved by the Secretary of Defense, or by the Secretary of the Treasury with respect to the Coast Guard, a member who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

(f) The Secretary concerned may prescribe regulations for the administration of this section in his department. (Sept. 7, 1962, P. L. 87-649, § 1, 76 Stat. 467.)

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(f) • • •

(g) Under regulations to be prescribed by the Secretary of Defense, or the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a member who is designated as having a critical military skill and who is entitled to a bonus computed under subsection (a) of this section upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus. The additional amount shall be paid in equal yearly installments in each year of the reenlistment period. However, in meritorious cases the additional amount may be paid in fewer installments if the Secretary concerned determines it to be in the best interest of the members. An amount paid under this subsection does not count against the limitation prescribed by subsection (c) of this section on the total amount that may be paid under this section. (As amended Aug. 21, 1965, P. L. 89-132, § 3, 79 Stat. 547; Oct. 22, 1968, P. L. 90-623, § 3(1), 82 Stat. 1314.)

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37 U.S.C. 308 (1974)

PUBLIC LAW 93-277
93RD CONGRESS, S. 2771
MAY 10, 1974

AN ACT

To amend chapter 5 of title 37, United States Code, to revise the special pay bonus structure relating to members of the armed forces, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Armed Forces Enlisted Personnel Bonus Revision Act of 1974".

SEC. 2. Chapter 5 of title 37, United States Code, is amended as follows:

(1) Section 308 is amended as follows:

"§ 308. Special pay: reenlistment bonus

"(a) A member of a uniformed service who—

"(1) has completed at least twenty-one months of continuous active duty (other than for training) but not more than ten years of active duty;

"(2) is designated as having a critical military skill by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy;

"(3) is not receiving special pay under section 312a of this title; and

'(4) reenlists or voluntarily extends his enlistment in a regular component of the service concerned for a period of at least three years;

may be paid a bonus, not to exceed six months of the basic pay to which he was entitled at the time of his discharge or release, multiplied by the number of years, or the monthly fractions thereof, of additional obligated service, not to exceed six years, or $15,000, whichever is the lesser amount. Obligated service in excess of twelve years will not be used for bonus computation.

"(b) Bonus payments authorized under this section may be paid in either a lump sum or in installments.

"(c) For the purpose of computing the reenlistment bonus in the case of an officer with prior enlisted service who may be entitled to a bonus under subsection (a) of this section, the monthly basic pay of the grade in which he is enlisted, computed in accordance with his years of service computed under section 205 of this title, shall be used instead of the monthly basic pay to which he was entitled at the time of his release from active duty as an officer.

"(d) A member who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of

his enlistment is of the total enlistment period for which the bonus was paid.

"(e) This section shall be administered under regulations prescribed by the Secretary of Defense for the armed forces under his jurisdiction, and by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

"(f) No bonus shall be paid under this section with respect to any reenlistment, or voluntary extension of an active-duty enlistment, in the armed forces entered into after June 30, 1977."

(2) Section 208a is amended to read as follows:

"§308a. Special pay: enlistment bonus

"(a) Notwithstanding section 514(a) of title 10 or any other law, under regulations prescribed by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a person who enlists in an armed force for a period of at least four years in a skill designated as critical, or who extends his initial period of active duty in that armed force to a total of at least four years in a skill designated as critical, may be paid a bonus in an amount prescribed by the appropriate Secretary, but not more than $3,000. The bonus may be paid in a lump sum or in equal periodic installments, as determined by the appropriate Secretary.

"(b) Under regulations prescribed by the Secretary of Defense or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a person who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

"(c) No bonus shall be paid under this section with respect to any enlistment or extension of an initial period of active duty in the armed forced made after June 30, 1977."

SEC. 3. Notwithstanding section 308 of title 37, United States Code, as amended by this Act, a member of a uniformed service on active duty on the effective date of this Act, who would have been eligible, at the end of his current or subsequent enlistment, for the reenlistment bonus prescribed in section 308 (a) or (d) of that title, as it existed on the day before the effective date of this Act, shall continue to be eligiole for the reenlistment bonus under that section as it existed on the day before the effective date of this Act. If a member is also eligible for the reenlistment bonus prescribed in that section as amended by this Act, he may elect to receive either one of those reenlistment bonuses. However, a member's eligibility under section 308 (a) or (d) of that title, as it existed on the day before the effective date of this Act, terminates when he has received a total of $2,000 in reenlistment bonus payments, received under either section 308 (a) or (d) of that title as it existed on the day before the effective date of this Act, or under section 308 of that title, as amended by this Act, or from a combination of both.

SEC. 4. The amendments made by this Act become effective on the first day of the month following the date of enactment.

Approved May 10, 1974.

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DO Navy BUPERS Inst 1133.18 E § 7h

h. Attain eligibility prior to the effective date of termination of the VRB award in a rating/NEC designated for termination. Member must attain eligibility prior to the effective date of a reduction of award level to be eligible for the higher award level. Eligibility attained through an

early discharge for the purpose of immediate reenlistment, or extension of enlistment, or other modification of an existing service obligation, including any early discharge granted pursuant to article 3840240 of reference (d) (discharge within 3 months of expiration of active obligated service) shall be attained prior to the date the authority approving the modification is notified of the prospective termination or reduction of award in the rating/NEC. This is the date a command receives the Bureau of Naval Personnel directive announcing termination or reduction of awards in the rating/NEC.

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DOD Directive 1304.14

IV.

F. *Reduction and Termination of Awards.* When a military skill is designated for reduction or termination of award an effective date for reduction or termination of awards shall be established and announced to the field at least 90 days in advance. All awards on or after that effective date in military skills designated for reduction of award level will be at the level effective that date and no new awards will be made on or after the effective date in military skills designated for termination of awards.

1. *For Both Variable Reenlistment Bonus and Shortage Specialty (Proficiency Pay).* Secretaries of the Military Departments and the Assistant Secretary of Defense (Manpower and Reserve Affairs) will conduct an annual review of the retention and career manning situation in any military specialty that has attained or is projected to attain a career manning level of more than 105 percent.

a. If it no longer meets the criteria of subsection IV.D. above, it will be designated for either reduction or termination of award.

b. The review will consider the projected retention and career manning situations in the absence of the then current award so that a military specialty will not be desig-

nated for reduction or termination of award solely because the then current award has attained and is sustaining adequate retention and career manning in the military specialty.

2. *For Special Duty Assignment (Proficiency Pay).* Secretaries of the Military Departments and the Assistant Secretary of Defense (Manpower and Reserve Affairs) will conduct an annual review of special duty assignments that are designated for Special Duty Assignment (Proficiency Pay).

a. If the combination of total manning level and volunteer manning level do not meet the quantitative criteria in Table IV of reference (c) or the special duty assignment no longer meets the criteria in subsection IV.D. above, it will be designated for either reduction or termination of award.

b. The review will consider the projected volunteer manning and total manning situations in the absence of the then current award so that a special duty assignment will not be designated for reduction or termination of award solely because the then current award has attained and is sustaining adequate volunteers in the special duty assignment.

3. *For Superior Performance (Proficiency Pay).* Payments to members receiving Superior Performance (Proficiency Pay) will be terminated if their military skill is designated for payment of Shortage Specialty (Proficiency Pay) or Special Duty Assignment (Proficiency Pay).

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DOD Instruction 1304.15V. B(1)

B. *Individual Eligibility for Receipt of Awards*

1. *Variable Reenlistment Bonus.* An enlisted member is eligible to receive a Variable Reenlistment Bonus if he meets all the following conditions:

a. Is qualified and serving on active duty in a military specialty designated under provisions of paragraph V.A. 2. above for award of the Variable Reenlistment Bonus. Members paid a Variable Reenlistment Bonus shall continue to serve in the military specialty which qualified them for the bonus unless the Secretary of a Military Department determines that a waiver of this restriction is necessary in the interest of the Military Service concerned.

b. Has completed at least 21 months of continuous active service other than active duty for training immediately prior to discharge, release from active duty, or extension of enlistment.

c. Is serving in pay grade E-3 or higher.

Table IV

Quantitative Criteria for Initial/Continued Designation of a Special Duty Assignment for Special Duty Assignment (Proficiency Pay)

Current or Projected Total Manning Level (%)	*Current or Projected Vounteer Manning Level (%)*	*Award*
0-66	0-100	None
67-84	0-50	P-1 ($30)
	51 or above	None
85-94	0-25	P-1 ($50)
	26-66	P-1 ($30)
	67 or above	None
95-100	0-25	P-2 ($75)*
	26-50	P-1 ($50)
	51-75	P-1 ($30)
	76 or above	None

* No P-2 ($75) awards will be authorized until the actual effectiveness, based on Service experience, of the lower awards has been

d. Reenlists in a regular component of the Military Service concerned within three (3) months (or within a lesser period if so prescribed by the Secretary of the Military Department concerned) after the date of his discharge or release from compulsory or voluntary active duty (other than for training), or extends his enlistment, so that the reenlistment or enlistment as extended provides a total period of continuous active service of not less than sixty-nine (69) months.

(1) The reenlistment or extension of enlistment must be a first reenlistment or extension for which a reenlistment bonus is payable.

(2) No reenlistment or extension accomplished for any purpose other than continued active service in the designated military specialty shall qualify a member for receipt of the Variable Reenlistment Bonus.

(3) Continued active service in a designated military specialty shall include normal skill progression as defined in the respective Military Service classification manuals.

e. Has not more than eight years of total active service at the time of reenlistment or extension of enlistment.

f. Attains eligibility prior to the effective date of termination of awards in any military specialty designated for termination of the award. Member must attain eligibility prior to the effective date of a reduction of award level to be eligible for the higher award level. Eligibility attained through any modification of an existing service obligation, including any early discharge granted pursuant to 10 U. S.C. 1171, must have been attained prior to the date the authority approving the modification was notified of the prospective termination or reduction of award in the military specialty.

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evaluated and approved by the Assistant Secretary of Defense (Manpower and Reserve Affairs).

g. Meets such additional eligibility criteria as may be prescribed by the Secretary of the Military Department concerned.

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1304.15 VI. A.

VI. MAINTENANCE, REDUCTION, AND TERMINATION OF AWARDS

A. *Variable Reenlistment Bonus.* Members serving in a military specialty designated for reduction or termination of award under the provisions of subsection IV.F. of reference (a), will receive the award level effective on the date of their reenlistment or extension of enlistment, except as provided in paragraph V.B.1.f. above.

No. 75-1695

In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES A. CARINI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-7a) is reported at 528 F. 2d 738. The opinion and order of the district court (Pet. App. 9a-17a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1975. A timely petition for rehearing was denied on February 23, 1976 (see Pet. App. 8a).[1] The petition for a writ of certiorari was filed on May 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The order entered by the court of appeals denying the petition for rehearing was signed by the members of the panel on February

QUESTION PRESENTED

Whether, at the time they agreed to extend their enlistments in the United States Navy, petitioners acquired by contract or under the applicable statutes and regulations a vested right to the payment of "variable reenlistment bonuses."

STATEMENT

Petitioners are enlisted personnel in the United States Navy. At the time of their original enlistments, or shortly thereafter, petitioners agreed to extend their enlistments for an additional two years in order to qualify for training programs in electronics or some phase of nuclear operations. The extension agreements individually executed by petitioners provided, *inter alia*, that the extensions were "in consideration of the pay, allowances, and benefits which will accrue * * * during the continuances of [their] service" (Pet. App. 3a).

When petitioners executed their extension agreements, they apparently expected to receive from the Navy both a "regular reenlistment bonus" and a "variable reenlistment bonus" as they began to serve the extended periods of their enlistments.[2] But before petitioners had completed serving their original enlistments, Congress enacted the Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Pub. L. 93-277, 88 Stat. 119 (Pet. App.

20, 1976 (Pet. App. 8a). It was not filed with the clerk of the court, however, until February 23, 1976; we are lodging with the Clerk of this Court a copy of that order bearing that filing date.

[2]At the times petitioners agreed to extend their enlistments, the Navy was authorized to pay such bonuses under the Act of September 7, 1962, Pub. L. 87-649, 76 Stat. 467, as amended by the Act of August 21, 1965, Pub. L. 89-132, 79 Stat. 547. The pertinent provisions of these statutes were codified at 37 U.S.C. 308, and are set forth at Pet. App. 125a-127a.

127a-130a).[3] That Act eliminated both the regular and variable reenlistment bonuses provided under previously-existing law, and created a new bonus (commonly referred to as a "selective reenlistment bonus"), payment of which was conditioned upon the agreement of service personnel to extend their original enlistments by or to reenlist for three or four years. Although the Bonus Revision Act contained a savings clause protecting the eligibility of service personnel for a regular reenlistment bonus,[4] it did not contain a savings clause protecting eligibility for variable reenlistment bonuses.

Petitioners subsequently filed a suit in the United States District Court for the Eastern District of Virginia, seeking writs of habeas corpus ordering the Navy to release them from the remaining portions of their service obligations (Pet. App. 9a). They later filed an amended complaint, seeking an order requiring the Navy to pay them the variable bonuses to which they believed they were entitled (*ibid.*) After hearing, the district court held that the statutory provisions providing for payment of a variable bonus were an integral part of the contracts that petitioners had executed when they agreed to extend their enlistments, that Congress' decision to replace the regular and variable bonuses with a new selective bonus system had been motivated primarily by fiscal concerns, and that Congress was without power to abrogate previously-existing contractual obligations for such reasons (*id.* at 11a-16a).

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[3]The pertinent provisions of the Bonus Revision Act are codified at 37 U.S.C. (Supp. V) 308 and 308a, and are set forth at Pet. App. 127a-130a.

[4]Section 3 of the Bonus Revision Act, Pub. L. 93-277, 88 Stat. 121; Pet. App. 130a.

The court of appeals reversed, explaining in part (Pet. App. 5a):

> While the district court reasoned that the 1965 statute became a part of the reenlistment agreement[s], we think it did not. Those agreements were said to be in consideration of the "pay, benefits and allowances which will accrue." There is no reference to a VRB [variable reenlistment bonus]. Indeed, there is no specification at all of what pay will accrue. On its face, it seems to us to mean that the enlistee will receive the pay authorized by statute and regulation from time to time as he performs his service. Indeed, the [petitioners] concede that the monthly salary they receive was not fixed at the rates in effect at the time of the contracts. It is subject to the unfettered control of the Congress. The Supreme Court has said that "a soldier's entitlement to pay is dependent upon statutory right" [quoting from *Bell* v. *United States*, 366 U.S. 393, 401].

ARGUMENT

The decision in this case conflicts with the decision of the Court of Appeals for the District of Columbia Circuit in *Larionoff* v. *United States*, 533 F. 2d 1167. In *Larionoff*, the court of appeals held that enlisted members of the United States Navy acquired a vested right to the payment of variable reenlistment bonuses at the time they agreed to extend their original enlistments. The court further held that that right could not be altered by changes in the regulations governing the administration of the variable bonus program or by statutory changes not made pursuant to some paramount constitutional power such as that contained in the War Powers Clause.

The Solicitor General has authorized the filing of a petition for a writ of certiorari to review the court of appeals' decision in *Larionoff*.[5] The conflict between the decisions in *Larionoff* and in this case has created significant administrative problems for the Navy, encourages forum shopping, and promises to result in substantial additional litigation. As noted by petitioners (Pet. 7, 11-12), the issue presented here is now before two other courts of appeals[6] and has also been raised in numerous suits pending in various federal district courts.

CONCLUSION

For the foregoing reasons, we do not oppose the granting of the petition for a writ of certiorari in this case.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

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[5]By order of August 17, 1976, the Chief Justice extended the time for filing a petition for a writ of certiorari in *Larionoff* to and including September 26, 1976.

[6]On July 30, 1976, the Court of Appeals for the Second Circuit entered an order in *Caola* v. *United States*, Civil Action No. 76-2052, extending the time for filing the government's brief on appeal to and including October 29, 1976. But the court expressly provided in its order that the briefing schedule it had set was subject to change depending upon this Court's disposition of the petitions filed in the present case and in *Larionoff*.

DOJ-1976-08

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1695

JAMES A. CARINI, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*

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OCTOBER TERM, 1975

No. 75-1695

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BRIEF AMICUS CURIAE

THE INTEREST OF AMICUS CURIAE IN CARINI v. UNITED STATES

William F. Karlin, Mark Constable, Roy W. Aikin, Ronald G. Saylors, John C. Adams, and Steven C. Wood, six enlisted members of the United States Navy, respectfully submit this brief *amicus curiae* to the Court in support of granting the writ of certiorari.[1]

In this action, two hundred sixty Navy enlisted personnel sought relief from the action of the United

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[1] The original written consents to filing of this brief, from counsel for petitioners and counsel for the government are on file with the Clerk of the Supreme Court.

States Navy which purported to abrogate their right to Variable Re-enlistment Bonuses in the amount of approximately $4,000 per person—an important part of the consideration for their contract agreements. The district court granted petitioners' motion for summary judgment for money damages, in the amount of the value of each member's re-enlistment bonus, Appendix, 9a.[2] On appeal, the court of appeals reversed, holding that petitioners were not entitled to any relief, Appendix, 2a. The enlisted members have now petitioned this Court for a writ of certiorari to review the decision of the Fourth Circuit. The *amici* are presently among the plaintiffs in federal court actions pending in other districts.[3] Each of these cases presents the identical claim for bonuses urged by the petitioners here. The cases represented by *amici* are in the following stages:

(1) William F. Karlin is one of seventy-six individually named plaintiffs in *Alderfer* v. *Schlesinger*, C.A. No. 74-1854 (D.S.C. filed Nov. 26, 1974), in which all proceedings have been stayed since July 9, 1975, pending resolution of the appeal in *Carini* v. *United States*. (Counsel for Karlin represents about forty additional named plaintiffs and other counsel represent approximately thirty additional named plaintiffs in consolidated cases which have also been stayed.)

(2) Mark Constable is a representative plaintiff in *Agnew* v. *Schlesinger*, now *sub nom. Constable* v. *United States*, C.A. No. 75-1624 (D.S.C. filed Sept. 16, 1975), an alleged nationwide class

[2] References to "Appendix" are to the Appendix filed by the petitioners.

[3] These actions are among those referred to in the Petition for Writ of Certiorari, p. 7 n.7 and p. 11 n.5.

action, in which there is pending a motion for transfer and consolidation with *Wood* v. *United States, infra,* pursuant to 28 U.S.C. § 1404(a).

(3) Roy W. Aikin and Ronald G. Saylors are two of 452 individually named plaintiff- appellees in *Aikin* v. *United States*, and *Saylors* v. *United States*, Docket Nos. 75-3348, 75-3238 and 75-3432 (9th Cir., argued May 14, 1976), appeals from the Southern District of California which are awaiting decision in the United States Court of Appeals for the Ninth Circuit.

(4) John C. Adams is one of 232 individually named plaintiffs-appellees in *Adams* v. *United States*, Docket No. 75-3559 (9th Cir., argued May 14, 1976) an appeal from the Central District of California which is awaiting decision in the United States Court of Appeals for the Ninth Circuit.

(5) Steven C. Wood is a representative plaintiff in *Wood* v. *United States*, C.A. No. CV 75-0382-N (S.D.Cal. filed July 8, 1975), in which there is pending a motion for certification as a nationwide class action on behalf of all enlisted members of the Navy who have been deprived of bonuses for reasons identical to those at issue in *Carini* v. *United States*. Government officials have estimated (see footnote 4, *infra*) that there are as many as 30,689 persons similarly situated.

Each of these *amici*, therefore, has an immediate and direct interest in obtaining reversal of the judgment below, and entry of judgment on behalf of the plaintiff enlisted members in *Carini* v. *United States*, 528 F.2d 738 (4th Cir. 1975).

The principal purpose of this brief is to supplement the discussion presented in the Petition of the direct conflict between the legal principles governing federal contracts, as stated in prior decisions of this court, and the approach of the Court below.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because this case presents important questions of federal law that should be resolved by this Court, and because the judgment below is in sharp conflict with prior decisions of this Court governing the construction and enforcement of contracts between the United States and its citizens. See, *esp, Lynch* v. *United States*, 292 U.S. 571 (1934); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947); and *United States* v. *Seckinger*, 397 U.S. 203 (1970).

THE IMPORTANCE OF THE CASE

This case presents issues of great importance, both to thousands of enlisted men in the United States Navy and to the credibility of the military services of the United States in recruiting enlisted members of the volunteer military force.

The attempt by the United States Navy to renege on the payment of V.R.B.'s (conceded by the court below to have been "reasonably expected" by petitioners) has sparked more than two dozen lawsuits. See Petition for Writ of Certiorari, p. 7 n.2 and p. 11 n.5; cf. *In re U.S. Navy Variable Re-enlistment Bonus Litigation*, 407 F. Supp. 1405 (JPMDL 1976). The total value of the bonuses at issue may well exceed $120,000,000, if there are 30,000 sailors affected, as the government asserted in the district court in the *Adams* case.[4]

---

[4] See Affidavit of Rear Admiral Charles H. Griffiths, Assistant Chief of Naval Personnel for Enlisted Development and Distribution, dated September 27, 1974, filed by the government in *Adams* v. *United States*, *supra*, p. 3, line 29.

The sheer volume of litigation reflected here, the large number of persons involved, and the considerable significance of the resolution of this dispute to each of the thousands of individuals, clearly establish this case as one involving important questions of federal law, which should be decided by this Court.

Furthermore, the government conduct here at issue strikes at the core of the ability of the United States to recruit sufficient personnel to sustain an all-volunteer military force. This point was emphasized by a commentator in discussing the importance of enforcing promises made to induce military enlistment. Note, *Armed Forces Enlistment: The Use and Abuse of Contract*, 39 U.Chi.L.Rev. 783, 804-6 (1972):

> "The courts have also assumed that when a person enlists in one of the armed services' special enlistment programs, the provisions in his enlistment documents concerning the special training and duty assignments he is to receive are contractual. Unlike the provisions in the reserve component statements of understanding, the provisions are referred to as "promises" or "guarantees," not only in the enlistment documents, but also in military regulations, recruiting brochures, and mass media advertising.
>
> • • •
>
> "1. *The Need for Enforcement.* Perhaps the central reason for providing a legal remedy for breach of promise is to encourage voluntary reliance on the kinds of promises necessary in an economic system that depends largely on free exchange rather than governmental compulsion for the distribution of resources. The promotion of reliance on the promises of the government is similarly necessary; to the extent that the government depends on the voluntary action of its citi-

zens, rather than compulsion, to carry out its functions, such as the raising of armies, citizens must be able to rely on the promises that the government has made to induce them to act. If conscription is abolished and if the voluntary action of citizens becomes the sole means of filling the ranks of the armed services, the need to enforce guarantees made to induce enlistment will be particularly great. Recent studies made for the Department of Defense indicate that such promises would be one of the primary inducements of enlistment in an all-voluntary armed force."

Indeed, promises of benefits such as the lump sum Variable Reenlistment Bonus, and its successor, the Selective Reenlistment Bonus,[5] are powerful recruiting incentives, especially in inducing highly qualified persons to sign up for training in "critical rates." However, if the government is allowed to renege on payment of the bonuses in question here, it will set a precedent for future enlisted men undertaking obligations in expectation of bonuses that can be later repealed. Only reversing the judgment below will establish the principles necessary to restore confidence in the representations of military recruiting personnel.[6]

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[5] The Selective Reenlistment Bonus program, enacted in 1974, 37 U.S.C. § 308, is described in the Statutes set forth in the Appendix, pp. 127a-130a.

[6] Cf. *Reamer* v. *United States*, 532 F.2d 349, 352 (4th Cir. 1976) (Craven, J., dissenting):

> "The United States loses when it treats one of its citizens unfairly.
>
> * * *
>
> "In the new era of the Volunteer Army, I am surprised that the government would want what it has now obtained: a decision which, if publicized, must be read by prospective enlistees to mean: Warning! you may not safely rely upon the terms of your enlistment contract."

THE ERROR OF THE DECISION BELOW

1. The Principles of Lynch v. United States Require that Petitioners Be Paid Money Damages for the Breach of the Contractual Right To Reenlistment Bonuses Which Accrued at the Same Time Petitioners Obligated Themselves To Reenlist.

This Court established long ago that rights against the United States arising out of contracts with agencies of the federal government are protected by the Fifth Amendment to the Constitution. *Lynch* v. *United States*, 292 U.S. 571, 579 (1934); *United States* v. *Central Pacific Railroad Co.*, 118 U.S. 235, 238 (1886); *The Sinking Fund Cases*, 99 U.S. 700, 719, 721 (1879). Therefore Congressional power to abrogate government obligations from contracts is narrowly circumscribed. *E.g.*, *Lynch* v. *United States*, *supra*.

A. The enlistment contract incorporated provisions of existing regulations guaranteeing payment of the V.R.B.'s

The district court below found that the contract formed by each petitioner with the government, by execution of the "Agreement to Extend Enlistment" reciting as consideration the "pay, benefits and allowances which will accrue" to each petitioner, incorporated the existing federal statutes and regulations which provided for payment of the Variable Reenlistment Bonus to each petitioner. Appendix 11a. This was in accord with principles of long standing in the decisions of this Court, that contemporary provisions of federal law, including statutes and regulations, are incorporated into a contract. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384-85 (1947); *Louisville & Nashville R. Co.* v. *Chatters*, 279 U.S. 320, 330-31 (1929); *Northern Pacific Ry. Co.* v. *Wall*, 241 U.S. 87,

91-92 (1916).[7] In recent years, the government has argued strenuously (and successfully) that applicable regulations are incorporated in military contracts identical to the "Agreements to Extend Enlistment" involved in the instant case. *Rehart* v. *Clark*, 448 F.2d 170 (9th Cir. 1971). The Court of Appeals for the District of Columbia, after a thorough analysis of all applicable regulations, has declared that the correct interpretation of those regulations, and the only interpretation consistent with the statutory scheme of reenlistment incentives, is that petitioners attained eligibility for the VRB payments at the time they modified their service obligations, *i.e.*, when they signed their agreements to extend enlistment.[8] *Larionoff* v. *United States*, — F.2d — (D.C. Cir. 1976), Appendix, 82a-87a. The Court of Appeals below, since it erred in ignoring the fundamental principles of law governing federal contracts, did not even consider or mention the applicable regulations.

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[7] This is a principle of very wide applicability, such that this Court has also held provisions of state statutes also to be incorporated into contracts. *Wood* v. *Lovett*, 313 U.S. 362, 370 (1941); *Farmers & Merchants' Bank* v. *Federal Reserve Bank*, 262 U.S. 649, 660 (1923).

[8] It is this prior attainment of eligibility that differentiates this case from the typical instance where the compensation of a federal employee is changed by statute. The regulations provide that eligibility for VRB payment may be achieved "through any modification of an existing service obligation," Appendix, 84a, 134a, and it makes no difference for the purposes of this case whether eligibility is considered to be achieved at the date that the member modified his obligation by agreeing to extend his enlistment, or at the date the member who had modified his obligation is first certified as also having a critical skill. Cf. *Larionoff* v. *United States*, *supra*, Appendix, 86a, n.27.

The Court of appeals below recognized that the petitioners had understood—and *reasonably* so—that they would be paid the V.R.B. at the commencement of their periods or reenlistment, 528 F.2d at 741-42; Appendix, 7a:

> "When [the petitioners] executed their reenlistment agreements, they had been told of the provisions of § 308(g) and the regulations which seemingly would entitle them to the payment of the V.R.B. They had a reasonable expectation that they would get it, or something reasonably approximating it. . . . [T]hey could not be charged with an awareness that the Congress would so change the statute as to make them unqualified for any special bonus without an extension of their reenlistment agreements. . . . for a total of eight years service rather than of six. Their expectation of the receipt of a special enlistment bonus was a part of the inducement for their signing the reenlistment agreements, and now their expectations are frustrated."[9]

The court of appeals, then, found that *factually* the petitioners had agreed to reenlist[10] in return for pay-

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[9] The existence of the particular bargain for a specified period of extra service, and the reliance upon the expectations reasonably flowing from the statutes, Navy regulations, and specific promises to petitioners establish beyond cavil that the entitlement to V.R.B. is a property right, not a "gratuity" like a pension, retirement pay, or medical services for retirees, none of which are directly bargained for, nor have such "gratuities" any specific reference to a particular contract document, like the Agreements to Extend Enlistment in this case. Many of the petitioners and others similarly situated undoubtedly incurred substantial financial obligations in reliance upon the expected bonus, and were placed in severe straits when the bonuses were not paid.

[10] The terms "extend enlistment" and "reenlist" are used here synonymously, and are also used by the Navy synonymously.

ment of the V.R.B., but *legally* the agreements had to be construed to contemplate statutory change, because, in the view of the court of appeals (unsupported by the factual record or by citation of any authority governing construction of federal contracts), a reenlistment bonus could be withdrawn at any time, at the whim of Congress.[11] The Court reasoned, 528 F.2d at 741, Appendix, 6a:

> "Since . . . . all military pay is not fixed at the time of the enlistment or re-enlistment contract, we think this contract consideration clause anticipated possible statutory change."

This interpretation was clearly erroneous. In an unbroken line of precedent extending more than one hundred years, this Court has held that the United States is strictly bound by the terms of the contracts that it prepares, including those contracts entered into by the military departments. *United States* v. *Seckinger*, 397 U.S. 203, 210 (1970); *United States* v. *Standard Rice Co.*, 323 U.S. 106, 111 (1944);[12] *Garrison* v. *United States*, 74 U.S. 688, 690 (1869). This principle of construction is especially important in interpreting enlistment contracts, which are classical contracts of adhesion, generated by "the Government's vast economic

[11] The irrationality of *this* position in light of the superseding law is demonstrated by the fact that the new Selective Reenlistment Bonuses are paid in annual installments of up to six years. By the logical extension of Congress' "absolute" authority to control these bonuses by statute, Congress could, for solely financial reasons, repeal authority to pay and refuse to appropriate funds to pay the last four or five annual installments of such bonus.

[12] The contract in the *Standard Rice* case had been prepared by the government. *See* 101 Ct. Cl. 45, 53 F. Supp. 717, 722 (1944).

resources and stronger bargaining position." *United States* v. *Seckinger, supra,* 397 U.S. at 216. Had the government wished to preserve the right to reduce or abolish the V.R.B. payments by regulation or by statute, it had only to so provide in the documents it prepared. In fact, the current form of the Enlistment Contract (DD Form 4) includes such a provision.[13] However, as the court of appeals in *Larionoff* pointed out, Appendix, 87a-88a:

> "The Government authored these extension contracts, and it could easily have inserted a provision limiting an enlisted member's VRB eligibility to the award level on the date of actual entry into the period of extended service. Undoubtedly, if such a provision had been included, the Navy would have witnessed fewer extensions of enlistment. But there is no express limitation on eligibility, and the Government is therefore bound by the actual contract terms and the applicable military regulations."

The result in *Larionoff* was dictated by the decisions of this Court, and the result below was directly contrary to them. As this Court stated in *United States* v. *American Surety Co.*, 322 U.S. 96, 102 (1944), referring to a form contract prepared by the government: "we are not justified in rewriting the clear provisions of the contract to include what might well have been but was not inserted. . . ." Yet the Court

[13] "I understand that . . . statutes and regulations applicable to personnel in the Armed Forces of the United States may change without notice to me and that such changes may affect my status, compensation or obligations as a member of the Armed Forces, the provisions of this entitlement agreement to the contrary notwithstanding." No such provision is in any of the enlistment documents signed by petitioners.

below engaged in just such augmenting of the contract terms. The government might have been well advised to spell out an escape clause, but, as in another case involving a Navy contract, the courts should "not revise the contract which [the United States] draws on the ground that a more prudent one might have been made." *United States* v. *Standard Rice Co., supra,* 323 U.S. at 111.

In sum, the court of appeals below erred because it ignored the admonition of this Court in *Noonan* v. *Bradley,* 76 U.S. 394, 407 (1870):

> "... a party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him; and ... when an instrument is susceptible of two interpretations—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right."

In this case the petitioners and their fellow claimants in other cases took an agreement prepared by the Navy and "upon its faith incurred obligations." As the court of appeals noted below, Appendix, 7a, the interpretation urged by the government works injustice and that sought by the petitioners is consistent with "the right of the case." Therefore, there can be no doubt that the prior decisions of this Court require that the contracts here at issue be construed in favor of recovery by the petitioners.

B. Since the only motive of the statute relevant to petitioners was fiscal savings, the principles of Lynch v. United States protect petitioners' contractual rights to V.R.B.

Under these circumstances, the petitioners had in fact entered a valid contractual agreement with the United States Navy to reenlist. Therefore, the decision of this Court in *Lynch* v. *United States, supra,* is binding, and dispositive of the issues in this case:

> "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power.
>
> * * *
>
> "To abrogate contracts in the attempt to lessen government expenditure, would not be the practice of economy but an act of repudiation."

See also Perry v. *United States,* 294 U.S. 330 (1935); *The Sinking Fund Cases, supra.*

The court of appeals did not reach the intent of the Congressional repeal of the V.R.B. Every other court that has considered the matter, however, has been persuaded that the true purpose of the statute, and the only purpose of applying it to petitioners, was fiscal savings. *See* the Opinion of the District Court, Appendix, 14a-15a. *Accord: Larionoff* v. *United States, supra,* Appendix, 92a; and statement denying petition for rehearing, Appendix, 117a. Indeed, in its petition for rehearing in *Larionoff*, the United States conceded

"that there was a fiscal purpose behind the Act. . . ." *See* Appendix, 116a. The government has a heavy burden to discharge in proving that a paramount power was invoked, which the district court held was not discharged here. *See Lichter* v. *United States,* 334 U.S. 742, 758-65 (1948); Calabresi, *Retroactivity: Paramount Powers and Contractual Changes,* 71 Yale L.J. 1191, 1202 (1962).

As the district court found, this case is squarely within the principles announced by this Court in *Lynch.* Therefore, the petition for a writ of certiorari should be granted to review the decision below, which did not even mention the *Lynch* decision or its principles.

2. If Petitioners Are Not Entitled to Money Damages, They Are Entitled to Habeas Corpus Relief from Military Control Because of the Failure of the Government to Provide a Consideration That Was Reasonably Relied Upon as an Inducement for Agreeing To Enlist for an Extra Period of Duty.

The court of appeals below found that the petitioners had reasonably expected to receive the V.R.B. mandated by statute at the time they incurred their obligation to reenlist. If the courts are without power to order payment of a V.R.B. because it could not lawfully have been promised (a dubious proposition, as argued *supra*), certainly the courts have the power to relieve the petitioners of their purported obligation to serve the extended terms of enlistment. *Cf., e.g., Peavy* v. *Warner,* 493 F.2d 748 (5th Cir. 1974); *Shelton* v. *Brunson,* 465 F.2d 144 (5th Cir. 1972). As the district court in this case noted, Appendix, 13a at n.3:

> "While Congress, in Brooks [v. United States, 33 F. 68 (E.D.N.Y. 1939)], did abolish the reenlistment bonus, it did not require anyone to serve a term of reenlistment without a bonus."

Certainly this Court will not sanction the result that the petitioners must serve their reenlistment without receiving the principal consideration they reasonably expected for that reenlistment.

CONCLUSION

For the foregoing reasons we urge the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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